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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 86

CARLEY & HAMILTON, INC.; EDWARD MALDE, DOING BUSINESS AS A. B. C. TRANSFER & STORAGE COMPANY; S. BRIZZOLARA, ETC., ET AL., APPELLANTS,

vs.

FRANK G. SNOOK, AS CHIEF OF THE DIVISION OF MOTOR VEHICLES, STATE OF CALIFORNIA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED MAY 11, 1929

(34,202)

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IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 2274. In Equity

CARLEY & HAMILTON, INC., EDWARD MALDE, Doing Business as A. B. C. Transfer & Storage Company; S. Brizzolara, Doing Business as S. Brizzolara Draying Company; J. A. Clark, Doing Business as J. A. Clark Company; H. Jacobs, Doing Business as Commercial Drayage Company; Emmons Draying & Rigging Company, Inc., Farnsworth & Ruggles Draying & Rigging Company, Inc.; Fred C. Gerdes, Doing Business as Fred C. Gerdes Moving and Storage Company; King & Company, Inc., Joe Mangini Draying Company, Inc., H. T. Porter, J. Coughlin, and E. Coughlin, Doing Business as Red Line Transfer Company, O. Sharetg, G. Sharetg and A. Sharetg, Doing Business as Scharetg & Sons; L. Goldman and L. Levy, Doing Business as Schussler & Company; M. Worth, Doing Business as C. A. Worth Company; United Draying & Rigging Company, Inc.; Becker Storage Company, Inc., J. Haake, Doing Business as Empire Express; C. C. Miller, Doing Business as Miller Moving & Storage Company; Owl Transfer Company, Inc., Pierce Rodolph, Inc., Union Transfer Company, Inc., A. W. Reid, Doing Business as Reid's Express, Plaintiffs,

vs.

FRANK G. SNOOK, as Chief of the Division of Motor Vehicles, State of California, Defendant

BILL OF COMPLAINT—Filed Dec. 29, 1929

[fol. 2] To the Honorable Judges of the District Court of the United States for the Northern District of California, Southern Division, sitting in equity:

The plaintiffs bring this complaint on behalf of themselves and on behalf of all persons, firms, associations and

corporations similarly interested or situated and entitled to receive the benefits herein, against Frank G. Snook, as Chief of the Division of Motor Vehicles of California, Defendant; and thereupon plaintiffs complain of the said Frank G. Snook, as Chief of the Division of Motor Vehicles of California, Defendant, and show unto your Honors as follows:

I

That—

The Plaintiff Carley & Hamilton, Inc., operates 35 motor Vehicles;

The Plaintiff Edward Malde doing business as A. B. C. Transfer & Storage Company, operates 8 motor vehicles;

The Plaintiff S. Brizzolara, doing business as S. Brizzolara Draying Company, operates 4 motor vehicles;

The Plaintiff J. A. Clark, doing business as J. A. Clark Company operates 25 motor vehicles;

The Plaintiff H. Jacobs, doing business as Commercial Drayage Company, operates 7 motor vehicles;

The Plaintiff Emmons Draying & Rigging Company, Inc., operates 27 motor vehicles;

The Plaintiff Farnsworth & Ruggles Draying & Rigging Company, Inc., operates 90 motor vehicles;

The Plaintiff Fred C. Gerdes doing business as Fred C. Gerdes Moving & Storage Company, operates 4 motor vehicles;

The Plaintiff King & Company, Inc., operates 45 motor vehicles;

The Plaintiff Joe Mangini Draying Company, Inc., operates 23 motor vehicles;

The Plaintiff H. T. Porter, operates 4 motor vehicles;

The Plaintiff J. Coughlin and E. Coughlin, doing business as Red Line Transfer Company, operates 15 motor vehicles;

The Plaintiff O. Scharetg, G. Scharetg and R. Scharetg, doing business as Scharetg & Sons, operates 5 motor vehicles;

The Plaintiff L. Goldman and L. Levy doing business as Schussler & Company, operates 19 motor vehicles;

The Plaintiff M. Worth, doing busines as C. A. Worth Company, operates 24 motor vehicles;

The Plaintiff United Draying & Rigging Company, Inc., operates 39 motor vehicles;

The Plaintiff Becker Storage Company, Inc., operates 2 motor vehicles;

The Plaintiff J. Haake, doing business as Empire Express, operates 2 motor vehicles;

[fol. 3] The Plaintiff C. C. Miller doing business as Miller Moving & Storage Company operates 3 motor vehicles;

The Plaintiff Owl Transfer Company, Inc., operates 4 motor vehicles;

The Plaintiff Pierce Rodolph, Inc., operates 3 motor vehicles;

The Plaintiff Union Transfer Company, Inc., operates 17 motor vehicles;

The Plaintiff A. W. Reid doing business as Reid's Express operates 10 motor vehicles.

Said plaintiffs allege that they have for some years last past and are now operating said motor vehicles exclusively within the limits of incorporated cities in the State, and said motor vehicles do not use any public highway, except the streets of said incorporated cities, and the plaintiffs must use said motor vehicles on said streets, in order to carry on their business.

II

That the said Defendant Frank G. Snook, as Chief of the Division of Motor Vehicles, State of California, has been for some years last past and is now the duly appointed, qualified and acting chief of the division of motor vehicles, residing at Sacramento.

III

The State of California enacted the "California Vehicle Act," being Chapter 226, Statutes of 1923, as amended by Chapter 240, Statutes of 1925, and by Chapters 752, 844 and 864, Statutes of 1927—Said Act, as amended, is in full force and effect, and is herein referred to and made a part hereof, the same as if set out in full.

Under the provisions of said Act, as amended, the defendant, as Chief of division of motor vehicles has the sole jurisdiction, and it is his duty to enforce all the provisions of said Act (Sections 29, 30, 37).

That every owner of a motor vehicle, trailer or semi-trailer, which shall be operated upon the highways is compelled to register the vehicle (Sec. 36)—Every vehicle [fol. 4] registration shall expire at midnight on the Twenty-first day of December of each year, and shall be renewed annually—(Sec. 44).

The said defendant cann-t grant an application for registration or issue registration or number plates, unless the correct fee be paid (Sec. 49). It shall be unlawful and constitute a misdemeanor for any person to operate any motor vehicle, trailer or semi-trailer upon a public highway which shall not be registered and registration fees have not been paid (Sec. 51) and punished by a fine of not to exceed $500, imprisonment in the county jail for not to exceed six months, or by both such fine and imprisonment—moreover the registration fee and penalty *in*stitute a lien upon the vehicle upon which the same are due and it is the duty of said defendant to collect such fee and penalty by seizure of such vehicle and by the sale of such vehicle (Sec. 81).

Every motor vehicle, trailer, semi-trailer or electric motor must pay in advance, a registration and license fee of $3.00 before it can be operated on the public highways, except those exempted ((a) Sec. 77). In addition to said $3.00, each electric passenger, motor vehicle must pay in advance, $10.00 and every electric vehicle designed, used or maintained for the transportation of persons or property for hire must pay in advance from $50.00 to $90.00, depending upon the weight ((b) Sec. 77). In addition to said $3.00, every vehicle, including trailer or semi-trailer used or maintained for the transportation of persons or property for hire, except electric vehicles must pay, in advance, from $15.00 to $70.00 depending upon the weight ((c) Sec. 77). Vehicles not equipped wholly with pneumatic tires shall pay in addition to said $3.00 fee twice the amount of said fee ((c) Sec. 77). Manufacturers and deal-[fol. 5] ers shall pay in advance, fees on every motor vehicle or motorcycles. Fees charged for transfer of motor vehicle, trailer or semi-trailer, and for duplicate plate or certificate. Fees charged for chauffeur's license or a duplicate operator's or chauffeur's certificate or chauffeur's badge. Counties and incorporated cities have powers, only to license and regulate the operation of vehicles used for hire (Sec. 145).

The defendant shall deposit in the State Treasury to the credit of the motor vehicle fund all moneys collected during the preceding business day (Sec. 157). A motor vehicle fund was created and the State treasurer must deposit all moneys received by him from the defendant in said motor vehicle fund (Sec. 159). The balance of said fund, after the expenditure of so much as may be permitted for the support of the Division of Motor Vehicles, but not more than 25% collected, shall be divided, one half shall be paid to the counties in proportion to the number of vehicles registered in said counties as determined by the places of residences of the owners. All amounts paid to the counties shall be deposited in road funds and shall be expended exclusively in the construction and maintenance of public roads, bridges and culverts in said counties, but cities can be allotted money if counties so desire, the other half is expended solely for the maintenance, repair, widening, resurfacing and reconstructing of State and State park roads.

IV

That the plaintiffs allege the Supreme Court of California has interpreted the said (b) and (c) of Sec. 77 of said Act and declared that the sole purpose was to exact license fees on motor vehicles using the public highways and to raise funds with which the said public highways may be improved and kept in repair, and the money so raised [fol. 6] was collected as a charge for the use of said public highways by motor vehicles transporting passengers or property for hire. Reference is made to such decision, being Old Homestead Bakery v. Marsh, 242 Pac. 749—That the plaintiffs allege the said license taxes or fees, being a charge for the use of public highways by motor vehicles, are "Tolls."

V

That the plaintiffs allege the incorporated cities of the State have enacted ordinances and laws exacting license taxes or fees on motor vehicles, trailers and semi-trailers transporting passengers or property for hire using the streets of said cities, all of which license taxes or fees are in addition to the license taxes or fees under the provisions of (b) and (c) of said Sec. 77, as aforesaid. Said license

taxes or fees vary from $5.00 to $42.00 per motor vehicle, depending upon the city, and were enacted for the purpose of regulation of said motor vehicles transporting passengers or property for hire and for revenue and not less than 75% of the proceeds derived from said license taxes or fees have been and in the future will be applied to the maintenance and repair of said streets in said cities.

VI

That the plaintiffs allege the plaintiffs as well as said others, must pay on or before January 31, 1929 said license taxes or fees, in order to use the streets of incorporated cities and escape the said heavy fines or imprisonments, or both, together with said seizure and sale of said motor vehicles, and moreover they must use said motor vehicles or their business will be destroyed at their irreparable loss, damage and injury. Said defendant, solely under color of his office as Chief of the Division of Motor Vehicles, threatens to and will enforce said provisions of said "California [fol. 7] Vehicle Act," especially said unconstitutional clauses (b) and (c) of said Sec. 77, against the plaintiffs and all persons, firms, associations and corporations similarly interested or situated, unless restrained by the order of this Court.

VII

That the plaintiffs allege said clauses (b) and (c) of the Sec. 77 of the "California Vehicle Act," being Chapter 266, Statutes of 1923, as amended and said actions of the defendant Frank G. Snook in enforcing the said illegal clauses (b) and (c) were and are void and unconstitutional, being contrary to and in violation of the Constitution of the United States, especially the 14th Amendment thereof and the Constitution of the State of California, the protection of all of which the plaintiffs and all persons, firms, associations and corporations similarly interested or situated pray.

VIII

The premises considered these plaintiffs and all persons, firms, associations and corporations similarly interested or

situated have no plain adequate and complete remedy at law.

IX

That the matters involved in this controversy exceed in value the sum of Three Thousand (3,000) Dollars, exclusive of interest and costs.

X

For as much as these plaintiffs and all persons, firms, associations and corporations similarly interested or situated can have no adequate relief except in this Court and to the end that the defendant may, if he can, show why the plaintiffs and all persons, firms, associations and corporations similarly interested or situated should have the relief [fol. 8] herein prayed, and make full disclosure and discovery of all the matters aforesaid according to the best and utmost of their knowledge, information and belief, full, true, direct and perfect answer make to the matters in this bill of complaint hereinabove stated, but not under oath, an answer made under oath on behalf of themselves, as well as on behalf of all persons, firms, associations and corporations similarly interested or situated, who are entitled to the benefits herein, pray that an interlocutory injunction be granted restraining and enjoining the defendant, Frank G. Snook, as Chief of Motor Division, as aforesaid, from in any way or manner enforcing or threatening to enforce the said provisions of said clauses (b) and (c) of said Sec. 77 of the "California Vehicle Act," as aforesaid, and the plaintiffs pray that this Court proceed to call in two other judges, one of whom to be a circuit judge, for the purpose of hearing and determining the application for said interlocutory injunction as prayed for herein under the provisions of Section 266, as amended, of the Judicial Code, and the plaintiffs pray upon the final hearing of this cause before said Court consisting of three judges for a decree declaring the said clauses (b) and (c) of Sec. 77 of the "California Vehicle Act," being Chapter 266, Statutes of 1923, as amended are void and unconstitutional, and that the said defendant, Frank G. Snook, as Chief of Division of Motor Vehicles, be forever enjoined and permanently

restrained from enforcing the illegal, void and unconstitutional clauses (b) and (c) of said Sec. 77, as aforesaid, and further pray for all other, proper and further relief as may be just and equitable in the premises; and further for the costs and disbursements herein expended.

W. R. Crawford, J. F. Vizzard, Solicitors for Plaintiffs.

[fol. 9] Post Office address: 310 Call Building, San Francisco, Calif. Tel. Karny 131.

Duly sworn to by W. S. Hamilton. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 10] In United States District Court

[Title omitted]

Motion for an Interlocutory Injunction—Filed Dec. 29, 1928

Come now the Plaintiffs in the above entitled cause and move this Court for an order to show cause why the Plaintiffs are not entitled to the issuance of an interlocutory injunction until the final determination of said cause; and the Plaintiffs request this Court will call in two other Judges, one of whom shall be a Circuit Judge, under the provisions of Section 266, as amended, of the Judicial Code, so as to hear and determine said motion for an interlocutory injunction, as the constitutionality of the provisions of a Statute of the State of California, and the acts of the said Defendant, Frank G. Snook, as Chief of the Division of Motor Vehicles, in enforcing said provisions of said State Statute are involved in this action, and further, that said Court, consisting of three Judges, shall finally hear and determine such action.

Said motion is based upon the records and files in the cause, and the Affidavit attached to the Motion.

W. R. Crawford, J. F. Vizzard, Solicitors of Plaintiffs.

[fol. 11] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. F. VIZZARD—Filed Dec. 29, 1928

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. F. Vizzard, being first duly sworn, deposes and says; that for nine years last past he has been Manager and Secretary of the Draymen's Association of San Francisco; for four last past, Secertary and Manager for the California Transfer and Storage Association and for six years was Secretary and Manager of the California Truck Owner's Association; that part of his duties in these offices was to become conversant with the laws of the State of California regarding the registration and operation of vehicles, especially commercial vehicles and particularly Clauses B and C of Section #77 of the "California Vehicle Act;" that during the year 1928 there was collected by defendant under color of Section #77 of said Vehicle Act a sum in excess of $5,000,000 from the $3.00 registration fee, being Clause A; that there was collected the sum of $2,668,000 under color of Clauses B and C of Section #77; that there was collected in addition to these sums a sum in excess of $400,000 from chauffeurs' and operators' licenses; that under Section #159 of said Vehicle Act, defendant retained no more than 25% of the first two above mentioned figures to cover the expense of the operation of his department, including the regulation of vehicles on the public highways outside of incorporated cities, leaving a sum of about $6,000,000, which under the provisions of the Act were distributed one-half to the State Highway fund for the maintenance and repair of the Federal aided highways and one-half to the counties for the maintenance and construction of county roads; that under the provisions of Clauses of Section #159 of said Act, such counties may and do spend considerable amounts of monies for the construction of highways within the confines of incorporated cities, [fol. 12] the amount of which expenditures is at the present time unknown to affiant; that by reason of the passage of an Amendment to Clauses B and C of Section #77 of said California Vehicle Act, effective January 1st, 1929, the

figures above shown will be materially increased; that such increase in the opinion of affiant will be at least $2,000,000 per year; that in the opinion of affiant above named plaintiffs and all others in like situation will be required to pay at least 75% of all funds collected under color of Clauses B and C of Section #77 of the "California Vehicle Act."

J. F. Vizzard.

Subscribed and sworn to before me this 29th day of December, 1929. Charles D. O'Connor, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

[File endorsement omitted.]

[fol. 13] In United States District Court

[Title omitted]

Notice of Hearing—Filed Jan. 9, 1929

To the Honorable C. C. Young, Governor of the State of California; the Honorable U. S. Webb, Attorney General of the State of California, and Frank G. Snook, as Chief of Division of Motor Vehicles:

This is to notify you and each of you that, pursuant to Section 268, as amended, of the Judicial Code, the District Court of the United States for the Northern District, Southern Division, has set for hearing and determination in the Federal Court Room of this Court in the Federal Building in the City of San Francisco, California, at the hour of 10 o'clock A. M. on the 18th day of January, 1929, the application for an interlocutory injunction in the cause of Carley & Hamilton, Inc., et al., vs. Frank G. Snook, as Chief of Division of Motor Vehicles, being Cause No. 2274 L in Equity.

By order of said Court, the undersigned serve copies of the Bill of Complaint, the Motion for an Interlocutory Injunction with the Affidavit attached thereto, and Order entered herein.

J. F. Vizzard, Solicitor of Plaintiffs.

[fol. 14] Copies of the Bill of Complaint, the Motion for Interlocutory Injunction with Affidavit attached thereto and the Order entered thereon, and the Notice are ackknowledged this 8th day of January, 1929.

C. C. Young, Governor. U. S. Webb, Attorney General.

Service on Jan. 8, 1929.

F. G. Snook, as Chief of Division of Motor Vehicles.

[File endorsement omitted.]

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR RESTRAINING ORDER—Filed Jan. 30, 1929

To the Honorable Judge of the District Court of the United States for the Northern District of California, Southern Division, sitting in equity:

Come now the plaintiffs in the above cause and pray this Court on behalf of themselves and on behalf of all persons, firms, associations and corporations similarly interested or situated for a Restraining Order without notice against the defendant Frank G. Snook, as Chief of the Division of Motor Vehicles, commanding and directing him to in any way or manner enforcing or threatening to enforce the said provisions of said clauses "B" and "C" of said Section 77 of said California Vehicle Act until the hearing and determination of the temporary injunction prayed for in said bill of complaint.

This motion is based upon the Bill of Complaint herein, the records and files in the above entitled cause and the affidavit attached to this motion.

W. R. Crawford, J. F. Vizzard.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. F. VIZZARD—Filed Jan. 30, 1929

STATE OF CALIFORNIA,
City & County of San Francisco:

J. F. Vizzard, first being duly sworn, deposes and says: that he is one of the solicitors for the plaintiffs herein; that the plaintiffs filed their Bill of Complaint on the 29th day of December, 1928; that on the same date the solicitors filed a motion for an interlocutory injunction to be heard before a statutory court to be convened under Section 266 of the Judicial Code of the United States and that at said time the District Court heard said motion and was compelled to communicate with the Circuit Judge Gilbert at Portland, Oregon; that on the 7th day of January the said District Court set the said hearing before said Statutory Court for January 18th, 1929; that the affiant immediately on January 8th, 1929, served the papers in said cause upon Governor C. C. Young, and Frank G. Snook as Chief of the Division of Motor Vehicles and on the morning of January 9th affiant served the papers on U. S. Webb, Attorney General.

On said day Frank L. Guerena, Deputy Attorney Gen-
[fol. 17] eral, having been assigned as attorney for said Frank G. Snook on said day to-wit., January 9th, 1929 requested this affiant to postpone the date of said hearing for at least two weeks from January 18th, 1929, owing to the fact that his duties required him to be at Sacramento, California during the session of the Legislature; said Frank L. Guerena requested your affiant to make such request of your Court in order to save him from making a formal application to your Honorable Court for such extension; that your affiant took the matter up with the Court at his request although we were ready and willing to argue the motion for said Temporary Injunction at the time originally set, to-wit, January 18th, 1929. That shortly after January 7th, affiant took up with said F. L. Guerena the question of the enforcement of said clauses "B" and "C" of said Section 77 of said California Vehicle Act after Jan-

uary 31st, 1929 and said Guerena informed affiant that he would take up this matter with U. S. Webb, Attorney General and would notify affiant as soon as possible; that said Guerena had not informed said affiant although affiant had called on him at his office at numerous times for a week; affiant did not reach him until January 19th, 1929 by telephone; at said time said Guerena informed affiant that after consultation with the Attorney General said defendant Snook as Chief of the Division of Motor Vehicles could not and would not desist and refrain from enforcing the penalties of said California Vehicle Act if the plaintiffs and all others similarly interested and situated unless they pay the entire fees as set out in clauses "A," "B" and "C" of said Section 77 of said California Vehicle Act. In other words said Snook will enforce clauses "B" and "C" of said Section, although said plaintiffs and all others have served and filed said Bill of Complaint on December 29th, [fol. 18] 1928, and although a hearing and determination of said temporary injunction was set for hearing prior to the said 31st day of January, 1929.

This affiant and his associate solicitor feel that they are entitled to said Restraining Order prayed for as such hearing of January 18th, 1929 was set aside and reset by the efforts of the solicitors for said defendant.

On Saturday, January 19th, 1929 said Guerena suggested that the affiant should communicate with the defendant and that if said defendant would hold all the moneys collected from said clauses B and C of said Section 77 intact until after the hearing and determination of the temporary injunction set for February 5th, 1929, same would be agreeable to his office.

That on January 21st and 22nd, 1929 affiant called on said defendant, but could not reach him because he was at home ill; that on January 23rd he reached said defendant through his attorney, but defendant refuses to withhold said moneys unless with the advice of the Attorney General. That on January 24th the Attorney General refused to give such advice and consent.

J. F. Vizzard.

Subscribed and sworn to before me this 24th day of January, 1929. Charles D. O'Connor, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

[File endorsement omitted.]

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

RESTRAINING ORDER—Filed Jan. 30, 1929

The matter of the application for Restraining Order prayed for by plaintiffs came on for hearing.

It appearing that after an examination of the records, files and the motion for said Restraining Order and the affidavit of J. F. Vizzard attached to said motion and the argument of solicitors for the plaintiffs that the Court finds that said plaintiffs will be irreparably damaged unless said Restraining Order is issued out of this Court.

Therefore it is Ordered, Adjudged and Decreed that said defendant Frank G. Snook, as Chief of the Division of Motor Vehicles be, and he is hereby restrained and enjoined from expending, disbursing or dispositing in the State Treasury all moneys collected by him under the provisions of Clauses "B" and "C" of Section 77 of the California Vehicle Act, but all of said moneys shall be held intact, subject to any order to be made hereafter in the above entitled cause and until after the hearing and determination of the application for Temporary Injunction which will be held on February 6th, 1929.

Harold Sanderbach.

[File endorsement omitted.]

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT—Filed Jan. 25, 1929

Now comes Frank G. Snook, as Chief of Division of Motor Vehicles, State of California, named as defendant

in the above entitled proceeding and moves the above entitled court to dismiss the bill of complaint filed herein on the following grounds:

I

That said bill of complaint does not state facts sufficient to constitute a cause of action against said defendant, or to entitle complainants, or any of them, to the whole or any part of the relief prayed for in said bill.

II

That this court has no jurisdiction of the subject of this proceeding, or of the above named defendant, or of the State of California.

III

That there is a defect of parties plaintiff in that the several plaintiffs are not properly joined.

[fol. 21]

IV

That there is a misjoinder of parties plaintiff in that the plaintiffs are not properly joined.

V

That several alleged causes of action have been improperly united.

VI

That complainants have not, and no one of them has, legal capacity to sue defendant.

This motion is also based upon the said bill of complaint, the notice of motion and upon all of the papers and records on file in the above entitled proceeding.

Dated: —— —, ——.

U. S. Webb, Attorney General of California; Frank L. Guerena, Deputy Attorney General, Attorneys for Defendant Frank G. Snook, as Chief of Division of Motor Vehicles, State of California.

[File endorsement omitted.]

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

Before Hon. Frank H. Rudkin, Circuit Judge; Hon. A. F. St. Sure, District Judge; Hon. Harold Lounderback, District Judge

OPINION—Filed Feb. 13, 1929

Memorandum by the COURT:

This is a suit to restrain the enforcement of certain provisions of the California Vehicle Act of 1927. The plaintiffs are corporations and individuals operating motor vehicles exclusively within the limits of incorporated cities of the State and make no use of the highways of the state, except the streets of the cities in which they operate. The defendant is chief of the Division of Motor Vehicles in the state and by virtue of his office is charged with the duty of enforcing the provisions of the Motor Vehicle Act. Section 77a of the act prescribes a registration fee of $3.00 for the registration of every motor vehicle, trailer or semi-trailer, except those which are exempted by the act, to be paid at the time application is made for registration. Section 77b prescribes an additional registration fee for the registration of every electric passenger motor vehicle, and for the registration of every electric motor vehicle designed, used or maintained primarily for the transportation of passengers for hire or for the transportation of property; the additional fee varying from $50.00 to $90.00 depending upon the weight of the vehicle. Sections 77c prescribes an additional registration fee for the registration of vehicles, including trailers and semi-trailers, designed, used or maintained primarily for the transportation of passengers [fol. 23] for hire or for the transportation of property; the additional fee varying from $20.00 to $70.00, depending upon the weight of the vehicle; but the additional fee prescribed by this subsection need not be paid for electric vehicles. Section 51 declares that it shall be unlawful and constitute a misdemeanor for any person to operate, or for the owner thereof to knowingly permit the operation of any motor vehicle, trailer or semi-trailer upon a public highway, which shall not be registered, or for which the

registration fees have not been paid, when and as required by the provisions of the act. Section 21 defines public highway as, every highway, road, street, alley, lane, court, place, trail, drive, bridge, viaduct or trestle laid out or erected as such by the public, or dedicated or abandoned to the public, or intended or used for or by the general public, except such portions thereof as are used or prepared for use by pedestrians as sidewalks. Section 159 of the acts creates in the state treasury a motor vehicle fund in which is deposited all moneys received from registration fees and some other sources. One-half the net receipts from this fund is appropriated and authorized to be paid from the motor vehicle fund to the counties of the State in proportion to the number of vehicles registered in such counties as determined by the places of residence of the owners to whom the registration certificates are issued, and the board of supervisors of any county, in its discretion, may expend any portion of the sum so received by the county in the construction, maintenance and repair of streets, bridges and culverts within those incorporated cities therein, the legislative bodies of which, by ordinance, authorize such work of construction, maintenance and repair. In addition to the foregoing fees, the complaint avers that the incorporated cities of the state have enacted ordidances exacting license taxes or fees on motor vehicles, trailers and semi-trailers using the streets of the cities for [fol. 24] the transportation of passengers or property for hire; the amount of the tax or fee varying from $5.00 to $42.00 per motor vehicle in the different cities.

The plaintiffs challenge the validity of those portions of the act imposing a tax or registration fee on the vehicles owned and operated by them within the corporate limits of the several municipalities of the state on the ground that the fee is in the nature of a toll for the use of the highways, and inasmuch as the plaintiffs make no use of the highways outside of the municipalities and are taxed for such use by the municipalities, the exaction by the state violates the Fourteenth Amendment to the Constitution of the United States. This broad contention cannot be sustained. In the lawful exercise of its acknowledged police power, the states may, beyond question, exact registration fees

from owners and users of motor vehicles, varying with their horse power or weight, regardless of the extent or place of use, so long as the vehicles are or may be used on the public highways of the State. Thus in Hendrick v. Maryland, 235 U. S. 410-22, the court said:

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and to accommodate the growing traffic the State of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction the state put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious.

"In the absence of national legislation covering the subject a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation on its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their driver, charging therefor reasonable [fol. 25] fees graduated according to the horsepower of the engines—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce."

And in the late case of Kane v. New Jersey, 242 U. S. 160-7, the Court said:

"The power of a State to regulate the use of motor vehicles on its highways has been recently considered by this

Court and broadly sustained. It extends to non-residents as well as to residents. It includes the right to exact a reasonable compensation for special facilities afforded as well as reasonable provisions to insure safety. And it is properly exercised in imposing a license fee graduated according to the horse power of the engine."

For these reasons we are of opinion that the registration fee imposed by the state is a valid exercise of the police power of the State and violates no provisions of the Constitution of the United States.

Whether the fee or tax imposed by the municipalities for the like use is valid or not, we need not inquire because its validity is not questioned.

The decree or order heretofore entered granting a preliminary injunction, is therefore dissolved and the bill of complaint is dismissed for want of equity.

Let a decree be entered accordingly.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DISSOLVING INJUNCTION, ETC.—Feb. 13, 1929

Plaintiff's application for an injunction and defendant's motion to dismiss, heretofore argued and submitted, herein, and the Court having filed its Memorandum Opinion herein, it is in accordance with said opinion ordered that said application for an injunction be and the same is hereby denied; the preliminary injunction heretofore issued herein be and the same is hereby dissolved, and that the motion to dismiss be and the same is hereby granted and the cause dismissed. Further ordered that a decree be signed, filed and entered herein in form as submitted, dismissing cause and for costs.

[fol. 27] IN UNITED STATES DISTRICT COURT

No. 2274-L. In Equity

CARLEY & HAMILTON, INC., et al., Plaintiffs,

vs.

FRANK G. SNOOK, as Chief of Division of Motor Vehicles, Defendant

DECREE—Filed Feb. 13, 1929

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

1. That the preliminary injunction heretofore granted and issued in the above entitled cause be and the same is hereby dissolved.

2. That the bill of complaint herein be and the same is hereby dismissed for want of equity.

3. That the defendant have and recover of and from the plaintiffs his costs to be taxed and that execution issue therefor.

Dated 13th day of February, 1929.

Frank H. Rudkin. Frank H. Rudkin, Circuit Judge.
A. F. St. Sure. A. F. St. Sure, District Judge.
Harold Louderback. Harold Louderback, District Judge.

[File endorsement omitted.]

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR LEAVE TO FILE AMENDED BILL OF COMPLAINT

Come now the plaintiffs in the above entitled cause and show that they have served upon the solicitors of the defendant copies of the above Motion, a proposed amended

bill of Complaint and the notice of this motion, and they pray this Honorable Court for permission to file said proposed amended bill of complaint which is presented herewith, as provided for in the equity Rules promulgated by the Supreme Court of the United States.

W. R. Crawford, J Wizzard, Solicitors of Plaintiffs.

[fol. 29] In United States District Court

[Title omitted]

Amended Bill of Complaint—Filed Feb. 25, 1929

[fols. 30-33] To the Honorable Judges of the District Court of the United States for the Northern District of California, Southern Division, sitting in equity:

* * * * * * *

[fol. 34] IV

That the Congress of the United States on July 11th, 1916, enacted an Act entitled:

"An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes." Chap. 241, 39 Stat. at L. 355.

The State of California enacted a law, assenting to and agreeing to abide with the provisions of said Rural Post Roads Act, entitled:

"An Act expressing assent of the State of California to the provisions of the Act of Congress approved July 11, 1916, entitled 'An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes.'" Chap. 29, Laws of 1917.

Thereafter on November 9, 1921 Congress amended and supplemented said Act by the "Federal Highway Act," Chap. 119, 42 Stat. at L. 212.

That the Federal Government has since the year 1917 paid over to said State many millions of dollars under said Federal Acts for the construction or reconstruction of

highways and in the future said Federal Government will pay additional millions to said State. That said Federal aid has been expended either on State highways or county roads for construction or reconstruction of portions of said State highways or county roads. Every State highway or county road is a rural post road and comes within the provisions of said Federal Acts, one of said provisions provided:

"That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds."

[fol.35] V

That in said "California Vehicle Act" of 1923 as amended by Chap. 844, Stat. of 1927, the following provisions are found:

"Registration and License Fees

Title VII

Registration Fees:

Sec. 77. (a) A registration fee of Three Dollars shall be paid to the Division for the registration of every motor vehicle, trailer or semi-trailer except for those which are exempted in this Act, and such fee shall be paid at the time application is made for registration.

Fees for Electric Vehicles:

(b) In addition to the registration fee specified in subdivision (a) of this section, there shall be paid ten dollars, and for the registration of every electric motor vehicle designed, used or maintained primarily for the transportation of passengers for hire, or for the transportation of property, there shall be paid fees according to the sollowing schedule:

——, less than six thousand pounds $50
——, less than ten thousand pounds $70
——, ten thousand pounds or over $90

Fees for Motor Vehicles:

(c) The following registration fees in addition to the registration fee specified in sub-division (a) of this section

shall be paid for the registration of vehicles, including trailers and semi-trailers, designed, used or maintained primarily for the transportation o*g* passengers for hire or for the transportation of property, according to the following table:

When such vehicles are equipped wholly with pneumatic tires—

when unladen, three thousand pounds or more and less than six thousand pounds	$15.00
when unladen, six thousand pounds or more, but less than ten thousand pounds and limited to a total weight, including vehicle and load, not *to* exceeding twenty-two thousand pounds	40.00
when unladen, ten thousand pounds or more, a total weight, including vehicle and load, not exceeding twenty-two thousand pounds	50.00
when unladen, six thousand pounds or more and a total weight, including vehicle and load, in excess of twenty-two thousand pounds	70.00

[fol. 36] Vehicles not Equipped with Pneumatic Tires:

When such vehicles are not equipped wholly with pneumatic tires there shall be paid in addition to the fees specified in sub-division (a) twice the fees set forth in the foregoing table."

The plaintiffs allege that the owners of motor vehicles must make an application for registration, and said application must show whether the vehicle, trailer or semi-trailer is for private use or for the transportation of passengers for hire, for the transportation of property, or exempted by the act; every vehicle, trailer or semi-trailer must pay not only the registration fee of $3.00 under sub-division (a), but also the license fee demanded under sub-division (b) or (c) of said Section 77, as amended; ordinary number plates are issued on said applications showing the vehicle to be a passenger vehicle to be operated for private use under sub-division (a), and special number plates are issued to each vehicle, trailer or semi-trailer

which show said vehicle, trailer or semi-trailer comes within the provisions of said sub-divisions (b) or (c) and is to be operated for the transportation of passengers for hire or for the transportation of property and also special number plates are issued to exempted vehicles which show said vehicle, trailer or semi-trailer is not subjected to any registration and license fee.

That the defendant before the amendment increasing license fees under sub-division (b) and (c) collected from December 31, 1927, to December 29, 1928, about $5,200,000.00 from the registration fee of $3.00, and these plaintiffs and all others, except those exempted, were forced to pay in advance said amount of said money.

Also the plaintiffs and all persons, firms, associations [fol. 37] and corporations using the said Federal Aided highways, including the streets within the limits of municipalities, by their motor vehicles, trailers or semi-trailers for transportation of passengers or property, paid in advance the said license fees and during said period the defendant collected about $2,668,000.00 from said license fees and issued number plates designating said motor vehicles, trailers or semi-trailers were within the said sub-divisions (b) or (c) of Section 77 of said Act. The defendant expended about $1,700,000.00 for the maintenance of his office and the cost of regulating and enforcing the said provisions of said "California Vehicle Act", and will divide about $6,000,000.00 the net proceeds, equally between the State and Counties.

That said Amendment of 1927 does not go into force and effect until after January 31, 1929. Under said Amendment of 1927 the said license fees outlined in Subdivisions (b) were increased about 25% and for subdivision (c) were increased about 250%, and said amendment repealed the following clause in subdivision of (c), to-wit: "For each such vehicle weighing, when unladen, less than 3,000 pounds $10.00, and by such amendment many thousands of vehicles transporting passengers for hire or property have been freed from said license fees under said subdivision (c), although said vehicles weigh more than 6,000 pounds when loaded.

VI

The plaintiffs allege that the Supreme Court of California has interpreted the said sub-divisions of (b) and (c) of said Section 77 of said "California Vehicle Act" and declared that the purpose was to create a fund to maintain and repair the highways outside of the limits of municipalities and to receive compensation for the use of said [fol. 38] highways by motor vehicles and also the said license fees are exacted as revenue measures and the Federal Court is bound to respect the said meaning of said sub-divisions (b) and (c).

The plaintiffs allege that the license fees exacted under said sub-divisions (b) and (c) are "tolls", prohibited by said Federal Aid Legislation, as aforesaid, and every cent received has been expended for the maintenance and repair of said Federal Aided Highways.

VII

That the plaintiffs allege the incorporated cities of the State have enacted ordinances and laws exacting license taxes or fees on motor vehicles, trailers and semi-trailers transporting passengers or property for hire using the streets of said cities, all of which license taxes or fees are in addition to the license taxes or fees under the provisions of (b) and (c) of said Sec. 77, as aforesaid. Said license taxes or fees vary from $5.00 to $250.00, according to the weight of the motor vehicle and depending upon the city, and were enacted for the purpose of regulation of said motor vehicles transporting passengers or property for hire and for revenue and not less than 75% of the proceeds derived from said license fees or taxes have been and in the future will be applied to the maintenance and repair of said streets in said cities.

VIII

The plaintiffs are taxpayers and are financially able to pay the registration fees in said sub-division (a), to-wit, $3.00 for each motor vehicle, trailer or semi-trailer owned by them and offered to pay said registration fees, but the

defendant has refused and will refuse to accept said monies for said registration fees, unless the plaintiffs and said [fol. 39] others pay in addition the license fees in sa*di* sub-divisions (b) or (c). That said plaintiffs and all others similarly interested or situated use exclusively the streets of municipalities with their vehicles and have paid, as aforesaid, said "tolls" for the privilege of using said streets.

That the plaintiffs and said others must pay on or before January 31, 1929, said license fees in said sub-divisions (b) or (c) of said Section 77, to obtain said special number plates before using the streets of the municipalities, and this defendant threatens to and will cause the arrests of said plaintiffs and said others and they will be subjected to heavy fines or imprisonments, or both, and also their vehicles will be seized and sold, and further said plaintiffs and said others will be compelled in the future to buy additional vehicles in order to take care of their business and will be forced to pay said license fees on said additional vehicles.

That the plaintiffs have been informed and believe the fact to be and upon such information and belief allege that said defendant, under color of his office, will collect during the year 1929 at least $4,000,000.00 alone from said license fees exacted by said sub-divisions (b) and (c) of said Section 77, as amended, and will issue said special number plates, and that 75% of said amount will be collected from the plaintiffs and those persons, firms, associations and corporations similarly interested or situated who operate their vehicles exclusively on the streets of municipalities, as aforesaid, and further the defendant will not and cannot collect any license fee from any owner or operator of a vehicle weighing, unladen, less than 3,000 pounds, no matter if the weight of the vehicle and load exceed 6,000 pounds, and will not and cannot issue said special number plates, and said thousands of vehicles, which are used ex- [fol. 40] clusively for the transportation of passengers for hire or property, are relieved from said licenses fees, as aforesaid.

The plaintiffs and said others allege that the enforcement of said unconstitutional subdivisions (b) and (c), as aforesaid, by said defendant, will not only cause said plaintiffs

and said others irreparable loss and damage, but also their business will be irreparably destroyed by said thousands of vehicles weighing unladen 2,999 pounds or less, as aforesaid, and further said moneys so collected are expended on said Federal Aided Highways for the benefit of the owners of land adjacent to said highways to the irreparable loss and injury of said plaintiffs and all of said others who receive no benefit from such expenditures.

IX

That the plaintiffs, on behalf of themselves, as well as those persons, firms, associations and corporations similarly interested or situated, allege that said sub-divisions (b) and (c) of Section 77 of the "California Vehicle Act", Chapter 266, Statutes of 1923, as amended by Chapter 844, Statutes of 1927, and the said actions of the defendant Frank G. Snook, as Chief of the Division of Motor Vehicles, in enforcing said illegal subdivisions (b) and (c), as aforesaid, are unconstitutional and void, being contrary to and in violation of the 14th Amendment of the Federal Constitution, as well as the Constitution of the State of California, prohibiting the making or enforcement of any law which shall abridge the privileges or immunities of citizens, or which shall deprive any person of life, liberty, or property without due process of law, or denies to any person the equal protection of the laws, the protection of all of [fol. 41] which, the said plaintiffs and all of said others pray.

* * * * * * *

[fol. 42] W. R. Crawford, J. F. Vizzard, Solicitors for Plaintiffs.

[fol. 43] *Duly sworn to by W. S. Hamilton. Jurat omitted in printing.*

[File endorsement omitted]

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR LEAVE TO FILE AMENDED BILL OF COMPLAINT

To Frank G. Snook, as Chief of the Division of Motor Vehicles, defendant, and his solicitors, the Honorable U. S. Webb, Attorney General, and Frank L. Guerena, Deputy Attorney General:

Please take notice that the Plaintiffs in the above entitled cause will present a motion to file an amended Bill of Complaint to said Court at the Federal Building in the Court Room of said Court in the City of San Francisco, State of California, at the hour of 10 o'clock A. M. on the 25 day of February, 1929.

A copy of said Motion and the proposed Amended Bill of Complaint is served with the above Notice.

W. R. Crawford, J. F. Vizzard, Solicitors for Plaintiffs.

Receipt of said Notice, and Motion and proposed Amended Bill of Complaint acknowledged.

Dated February 23rd, 1929.

U. S. Webb, Frank L. Guerena, Solicitors of Defendant.

(Endorsed:) Filed March 25th, 1929.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION TO VACATE DECREE—March 25, 1929

The motion to set aside the decree and motion for leave to amend the complaint came on regularly this day to be heard. W. R. Crawford, Esq., and J. F. Vizzard, Esq., appearing as attorneys for complainants. Frank L. Guerena, Esq., appearing as attorney for defendant. After hearing Mr. Crawford it was ordered that the motion to set aside the decree be and the same is hereby denied.

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed April 16, 1929

And now, on this 15th day of April, 1929, came the plaintiffs by their solicitors W. R. Crawford and J. F. Vizzard and say that the order and decree made and entered in the above cause on the 13th day of February, 1929, denying the application for an interlocutory injunction against the defendant herein, is erroneous and unjust to plaintiffs:

Because the Court erred in refusing and denying the application for an interlocutory injunction against Frank G. Snook, as Chief of the Division of Motor Vehicles, the defendant herein.

And further, and now, on this 15th day of April, 1929, came the plaintiffs by their solicitors W. R. Crawford and J. F. Vizzard, and say that the order and decree entered in the above cause on the 13th day of February, 1929, dissolving the preliminary injunction, is erroneous and unjust to the plaintiffs:

Because the Court erred in dissolving the preliminary injunction.

And further, and now, on this 15th day of April, 1929, came the plaintiffs by their solicitors W. R. Crawford and [fol. 47] J. F. Vizzard, and say that the order and decree entered in the above cause on the 25th day of March, 1929, refusing and denying the application of the plaintiffs for permission to file an amended Bill of Complaint, is erroneous and unjust to plaintiffs:

Because the Court erred in refusing and denying the application for permission to file an amended Bill of Complaint.

Wherefore the plaintiffs pray that the said order and decree entered in said cause refusing and denying the application for said interlocutory injunction be reversed;

And further that said order and decree entered in said cause in dissolving the preliminary injunction be reversed;

And further that said order and decree entered in said cause dismissing the cause of action be reversed;

And further that said order and decree entered in the cause on March 25th, 1929, refusing and denying the appli-

cation of the plaintiffs for permission to file an amended bill of complaint be reversed;

And further that the lower court be directed and instructed to enter a decree as prayed for in said Bill of Complaint or the said amended Bill of Complaint, and for such proper relief as the plaintiffs are entitled to and as the nature of the cause demands.

W. R. Crawford, J. F. Vizzard,, Solicitors for Plaintiffs.

[File endorsement omitted.]

[fols. 48-57] In United States District Court

[Title omitted]

Petition for Appeal and Order Allowing Same—Filed April 16, 1929

The above named Plaintiffs, conceiving themselves aggrieved by the order and decree made and entered on the 13th day of February 1929, and said order and decree made and entered on the 25th day of March, 1929 in the above entitled action, do hereby appeal from the said orders and decrees to the Supreme Court of the United States, for the reasons specified in the Assignment of Error, which is filed herewith, and pray that this appeal may be allowed and a transcript of the records, proceedings, motions, orders, decrees and all papers in said action, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 15th day of April, 1929.

W. R. Crawford, J. F. Vizzard, Solicitors for Plaintiffs.

The foregoing appeal is allowed upon the filing of a proper bond in the amount of two hundred fifty dollars.

Frank H. Rudkin, Circuit Judge. Harold Lauderbach, District Judge. A. F. St. Sine, District Judge.

[File endorsement omitted.]

[fols. 58 & 59] Citation, in usual form, showing service on U. S. Webb and Frank L. Guerena, filed April 16, 1929, omitted in printing.

[fol. 60] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed May 11, 1929

The Appellants request the Clerk to file and print this statement of points relied upon and the following parts of the record:

Points Relied Upon

I

The Appellants (plaintiffs) bring this action as a class suit on behalf of themselves and all persons, firms, associations and corporations similarly interested or situated.

II

The Appellants, as well as all said others, have for some years last past and are now operating motor vehicles carrying passengers for hire, or property, and must use their motor vehicles in order to carry on their business. Said motor vehicles do not operate on any public highways outside of cities, but all of the same operate exclusively within the limits of cities using the streets thereof.

III

The State of California enacted the "California Vehicle Act," as amended, and by the provisions of said Act, as amended, vested this the Appellee (defendant) with the jurisdiction to enforce all of the provisions of said Act, [fol. 61] as amended. That under the provisions of subdivisions (b) and (c) of Section #77 of said Act, as amended, the appellants and all others similarly interested or situated must pay in advance the amount of money called for under said subdivisions before they and said all others can use said streets in said cities, as aforesaid, by their vehicles as aforesaid. That all the said charges under the said subdivisions (b) and (c) are collected for the purpose of raising funds with which the public highways outside of the limits of cities may be improved and kept in repair, and said charges are "tolls."

IV

The appellants, as well as said others similarly interested or situated, are required to pay in advance the license fees which have been assessed by the different cities in the State, in order to use the respective streets of said cities so as to carry on their business, as aforesaid. That said license fees, as aforesaid, were enacted so as to raise funds for the purpose of the cost of regulation and revenue for maintaining and repairing the streets thereof which have been damaged by the said motor vehicles, and said charges are "tolls."

V

That said subdivisions (b) and (c) of Section #77 of said Act, as amended, are revenue measures.

VI

That all the money to be collected by the Appellee under said subdivisions (b) and (c) as aforesaid will be used exclusively for the maintenance and repair of the Federal Aided Highways, and no portion of said money will be used for the maintenance and repair of the streets within the limits of the cities. The cities must maintain and repair [fol. 62] their streets and the money collected from the respective license fees is expended for the said cost of regulation and the balance for said maintenance and repair of their respective streets.

VII

The said subdivisions (b) and (c) of Section #77 of said "California Vehicle Act," as amended, compelling the appellants and all persons, firms, associations and corporations similarly interested or situated to pay in advance said charges are unconstitutional and void, being contrary to and in violation of the Fourteenth Amendment of the Federal Constitution.

VIII

The said subdivisions (b) and (c) of Section #77 of said "California Vehicle Act," as amended, compelling the

Appellants and all persons, firms, associations, and corporations similarly interested and situated to pay in advance said charges are unconstitutional and void, being contrary to and in violation of the Constitution of the State of California.

IX

Prior to the first California Vehicle Act of 1913 was enacted, the Constitution of California provided that the cities were granted the power to issue licenses and charge fees for the use of their streets by motor vehicles and the monies collected were used exclusively for the cost of regulation and maintenance and repair on the streets. The said provisions of said State Constitution are still in full force and effect. That said subdivisions (b) and (c) as aforesaid are unconstitutional and void being contrary to and in violation of the State Constitution prohibiting double taxaton, as well as the Fourteenth Amendment of the Fed- [fol. 63] eral Constitution.

X

The said threatened Acts of the Appellee in enforcing said unconstitutional and void subdivisions (b) and (c) of Section #77 of the "California Vehicle Act," as amended, are illegal, being contrary to and in violation of the Fourteenth Amendment of the Federal Constitution, and also the Constitution of California.

XI

The lower Court erred in dissolving the said restraining order and denying the application for an interlocutory injunction.

XII

The lower Court erred in granting the motion to dismiss the Bill of Complaint.

XIII

The lower Court erred in denying the application of the appellant to file said amended bill of complaint which had been presented to said Court after the said Court had filed a written opinion.

XIV

The appellants claim that they are entitled to an interlocutory injunction prayed for restraining and enjoining said appellee from enforcing said subdivisions (b) and (c) of Section #77 of said "California Vehicle Act," as amended, as said threatened Acts and the said subdivisions (b) and (c) as aforesaid are unconstitutional and void being contrary to and in violation of the Fourteenth Amendment of the Federal Constitution and also contrary to and in violation of the Constitution of the State of California.

[fol. 64] XV

The appellants pray this Honorable Court to reverse the order and decree of the Lower Court dissolving the restraining order and refusing an interlocutory injunction and granting a motion to dismiss the Bill of Complaint, and dismissing the Bill of Complaint, and further the Appellants pray that the Lower Court shall be directed to enter a final decree declaring the said subdivisions (b) and (c) of said Section #77 of said "California Vehicle Act," as amended, were void and unconstitutional, and the said Appellee, Frank G. Snook, as Chief of Division of Motor Vehicles, be forever enjoined and permanently restrained from enforcing the said illegal, void and unconstitutional subdivisions (b) and (c) aforesaid, and pay into the registry of the Court all of the moneys collected by him under the said subdivisions (b) and (c) of said Section #77 of the "California Vehicle Act," as amended, from the Appellants and all others similarly interested or situated, as aforesaid, and further for allowances, distributions and payments as may be hereafter determined, awarded and decreed, and further for any other and proper relief as this Honorable Court may deem proper and fit in the premises.

Designation of Parts of Record to be Printed

1. Bill of Complaint.
2. Motion for an Interlocutory Injunction, and Affidavit of J. F. Vizzard attached to said motion.
3. Order of Court fixing time for hearing on Motion before three Judges.

[fol. 65] 4. Notice served on Governor, Attorney General, and Frank G. Snook, as Chief of Division of Motor Vehicle, Defendant.

5. Application for Restraining Order and affidavit of J. F. Vizzard.

6. Order granting restraining order.

7. Motion to dismiss the Bill of Complaint.

8. Memo. opinion entered by the Court.

9. Order and Decree entered by Court.

10. Motion to file Amended Bill of Complaint, and the following paragraphs of the proposed amended bill attached to said motion: IV, V, VI, VII, VIII, and IX.

11. Notice served on Defendant for hearing on said Motion.

12. Order and Decree of March 25th, 1929.

13. Assignment of Error.

14. Prayer for Appeal and granting the same.

15. Citation.

16. Names of Solicitors and addresses: W. R. Crawford, 625 North Elm Drive, Beverly Hills, Calif.; J. F. Vizzard, 310 Call Building, San Francisco, Calif.; Edwin C. Ewing, 625 North Elm Drive, Beverly Hills, Calif.

W. R. Crawford, J. F. Vizzard, Edwin C. Ewing, Solicitors for Appellants.

Due service and Receipt of two copies of the above Points relied upon and designation of parts of Record to be printed.

Dated May 3rd, 1929.

U. S. Webb, Attorney General; Frank L. Guerena, Deputy Attorney General, Solicitors for Appellee. H. F.

[fol. 66] [File endorsement omitted.]

Endorsed on cover: File No. 34,202. N. California, D. C. U. S. Term No. 86. Carley & Hamilton, Inc.; Edward Malde, doing business as A. B. C. Transfer & Storage Company; S. Brizzolara, etc., et al., appellants, vs. Frank G. Snook, as Chief of the Division of Motor Vehicles, State of California. Filed May 11, 1929. File No. 34,202.

FILE COPY

FILED
JUN 1 19
CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, [redacted] 1928

No. [redacted] 86

CARLEY & HAMILTON, INC., et al.,
Appellants,

vs.

FRANK G. SNOOK, as Chief of Division of Motor Vehicles,
Appellee.

STATEMENT AND PETITION TO ADVANCE.

W. R. CRAWFORD,
North Elm Drive, Beverly Hills, California,
J. F. VIZZARD,
Call Building, San Francisco, California,
EDWIN C. EWING,
L. C. Smith Building, Seattle, Washington,
Solicitors for Appellants.

In the Supreme Court
OF THE
United States

OCTOBER TERM, [redacted] 1928

No. 893

CARLEY & HAMILTON, INC., et al.,
Appellants,

vs.

FRANK G. SNOOK, as Chief of Division of Motor Vehicles,
Appellee.

STATEMENT AND PETITION TO ADVANCE.

Come now the appellants in the above entitled cause and file their statement required by Rule 12 of the Supreme Court and petition that this cause be advanced for an early hearing.

(a) The appeal herein is based upon the provisions of Paragraph 3 of Section 238 of the Judicial Code, as amended by the Act of February 13th, 1925, C. 229, 43 Stat. 936.

(b) On February 13th, 1929, the lower Court consisting of three judges, one of whom is a circuit judge, entered an order or final decree dissolving a preliminary injunction theretofore granted, and dismissed the bill of complaint for want of equity, and the plaintiffs, now appellants, are required to pay the defendant's costs to be taxed (Record, p. 27). On February 25th, 1929, the plaintiffs presented to said Statutory Court a motion to file a proposed amended bill of complaint which was attached to said motion (Record, pp. 28 to 43 inclusive) and a proper notice of motion was served on the defendant (Record, p. 44). Thereafter said Statutory Court entered an order or decree on March 25th, 1929, refusing the motion to file said amended bill of complaint (Record, p. 45). On April 15th, 1929, the plaintiffs prayed for an appeal from the said order and decree of February 13th, 1929, and also from the said order and decree of March 25th, 1929. Said appeal was granted by the said Statutory Court (Record, p. 48).

(c) The bill of complaint shows: The plaintiffs instituted the action as a class suit (Record, p. 2). The plaintiffs must use their vehicles in order to carry on their business, and said vehicles operate exclusively within the limits of the cities and do not use any public highway outside of said streets of said cities (Record, p. 3). The defendant is the State Officer who enforces the provisions of the California Vehicle Act (Record, p. 3). The "California Vehicle Act," being Chapter 226, Statutes of 1923, has been amended by Chapter 240, Statutes of 1925, and by Chapters 752, 844 and 864, Statutes of 1927. The provisions of said

Act, as amended, compel all owners and operators of vehicles to obtain a license before they can use any public highway, and in addition subdivisions (b) and (c) of Section 77 of said Act, as amended, must pay licenses depending upon the weight of their vehicles, and unless they pay the same, said owners and operators are subjected to heavy fines and imprisonment and their vehicles can be confiscated; counties and incorporated cities have powers not only to license but also to regulate the operation of vehicles. The defendant shall deposit the collection in the State Treasury. Not more than 25% of the moneys collected can be used for regulation, the balance is used for the repair and maintenance of the public highways outside of the limits of incorporated cities, and counties can, if they desire, use some of their share for the maintenance and repair of the designated streets and incorporated cities (Record, pp. 3, 4, 5). The Supreme Court of California has interpreted the said subdivisions (b) and (c) of said Section 77 of said Act and declared that the sole purpose was to exact license fees on motor vehicles using the public highway and to raise funds with which said public highways may be improved and kept in repair, and the money so raised was collected as a charge for the use of said public highways by motor vehicles transporting passengers for hire or property. The plaintiffs allege the said license taxes or fees under said subdivisions (b) and (c) aforesaid are charges for the use of public highways by motor vehicles, to-wit, "tolls" (Record, pp. 5, 6). The plaintiffs allege the incorporated cities have enacted ordinances exacting charges upon all motor vehicles trans-

porting passengers for hire or property using the streets of said cities and said charges are in addition to the said license taxes or fees under the provisions of said subdivisions (b) and (c). Said municipal ordinances require license fees varying from $5.00 to $42.00 per motor vehicle depending upon the city and said ordinances were enacted for the purpose of obtaining revenue for the cost of regulating said motor vehicles and maintaining and repair of the streets of the said respective cities, and not less than 75% of the moneys collected by said cities is used and will be in the future used to maintain and repair said streets (Record, p. 6). The plaintiffs, as well as all others similarly interested or situated must pay said charges under said subdivisions (b) and (c), as aforesaid, in advance before they can use said motor vehicles on any streets, although they have paid the same character of charges in said cities, unless their businesses are destroyed, or they will be subjected to heavy fines and imprisonment, or both, together with seizure and sale of said motor vehicles. The defendant, solely under color of the office as Chief of Division of Motor Vehicles, threatens to and will enforce said subdivisions (b) and (c), as aforesaid, against the plaintiffs and all persons, firms, associations and corporations similarly interested and situated unless restrained by the order of this Court (Record, pp. 6, 7). The plaintiffs allege said subdivisions (b) and (c) of Section 77 of said Act, as amended, as aforesaid, and the threatened acts of the enforcing of said illegal exactions are void and unconstitutional, being contrary to and in violation of the Constitution of the United States, especially the

Fourteenth Amendment thereof and the Constitution of the State of California, the protection of all of which the plaintiffs and all persons, firms, associations and corporations similarly interested and situated pray (Record, p. 7). There is no plain, adequate and complete remedy at law (Record, p. 7). Matters involved in this controversy exceed in value the sum of three thousand (3000) dollars exclusive of interest and costs (Record, p. 7). Plaintiffs on behalf of themselves, as well as all persons, firms, associations and corporations similarly interested and situated, prayed for an interlocutory injunction restraining the defendant from enforcing the provisions of said subdivisions (b) and (c) of said Section 77 of the "California Vehicle Act" and to call in two additional judges, one of whom to be a circuit judge, for the purpose of hearing and determining said motion, as provided by Section 266 of the Judicial Code, as amended, and upon the final hearing before said Court consisting of three judges, for a decree declaring said subdivisions (b) and (c) are void and unconstitutional, and the defendant be forever enjoined from enforcing said illegal, void and unconstitutional subdivisions, and for all and other, proper and further relief (Record, p. 8).

Motion and affidavit to call in two additional judges, one of whom to be a circuit judge (Record, pp. 10, 11).

Order granted on motion setting hearing before three judges, one of whom was a circuit judge (Record, pp. 13, 14).

Proper notice served on Governor, Attorney General, and defendant (Record, pp. 15, 16).

Motion and affidavit for restraining order (Record pp. 17-20).

Order granting restraining order (Record, p. 21).

Motion of defendant to dismiss the bill of complaint (Record, p. 22).

Memo. Opinion of said Statutory Court composed of two District Judges and one Circuit Judge. The Court held "that the registration fee imposed by the State is a valid exercise of the police power of the State and violates no provisions of the Constitution of the United States," but did not pass upon the questions of "toll" and the provisions of the California Constitution (Record, pp. 23-26).

Order and decree entered by said Statutory Court, dissolving preliminary injunction and the bill of complaint was dismissed for want of equity (Record, p. 27).

Plaintiffs filed a motion for permission to file an amended bill of complaint attached to said motion (Record, pp. 28-43).

Proper service upon the defendant was made (Record, p. 44).

Said Statutory Court entered an order or decree to-wit: "it was ordered that the motion be set aside the decree be and the same is hereby denied" (Record, p. 45).

Plaintiffs filed assignment of error (Record, pp. 46, 47).

Prayer for appeal and granting same by said Statutory Court (Record, p. 48).

Citation signed by Statutory Court, served upon defendant and filed (Record, p. 49).

Appeal bond approved by said Statutory Court and filed (Record, pp. 50, 53).

Praecipe served and filed (Record, pp. 54, 55).

Certificate of Clerk (Record, p. 56).

As is seen by the record the plaintiffs, under the provisions of Section 266 of the Judicial Code, as amended, filed said bill of complaint, and moved for an interlocutory injunction to restrain the defendant, an officer of the State of California, from enforcing said subdivisions (b) and (c) of Section 77 of the "California Vehicle Act," as amended, upon the ground of the unconstitutionality of said subdivisions and have taken all of the proceedings necessary to vest this Honorable Court with sole jurisdiction of an appeal from the said orders or decrees entered by said Statutory Court.

(d) The following cases sustained the jurisdiction:
Buck v. Kuykendall, 267 U. S. 308;
Morris, et al. v. Duby, et al., 274 U. S. 135.

Wherefore the appellants pray this Honorable Court to sustain its jurisdiction, and further to advance this case so as to hear and determine the questions before the appellants are compelled to pay said exactions for the year 1930.

Dated, San Francisco, California,
May 22, 1929.

Respectfully submitted,

W. R. CRAWFORD,
J. F. VIZZARD,
EDWIN C. EWING,
Solicitors for Appellants.

Due service and receipt of a copy of the within is hereby admitted

this_____day of May, 1929.

_____

Attorney General of the State of California,

_____

Deputy Attorney General of the State of California,
Solicitors for Appellee.

FILE COPY

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CHARLES ELMORE CRO
CL

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. 86

CARLEY & HAMILTON, INC., et al.,
Appellants,

vs.

FRANK G. SNOOK, as Chief of Division of Motor Vehicles,
Appellee.

BRIEF FOR APPELLANTS.

W. R. CRAWFORD,
Call Building, San Francisco, California,
J. F. VIZZARD,
Call Building, San Francisco, California,
EDWIN C. EWING,
L. C. Smith Building, Seattle, Washington,
Solicitors for Appellants.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. 86

CARLEY & HAMILTON, INC., et al.,
Appellants,

vs.

FRANK G. SNOOK, as Chief of Division of Motor Vehicles,
Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

Plaintiffs brought the complaint on behalf of themselves and on behalf of all persons, firms, associations and corporations similarly interested or situated and entitled to receive the benefits herein, against Frank G. Snook, as Chief of the Division of Motor Vehicles of California, defendant. (R. 1, 2.) The plaintiffs have for years last past and now are operating motor

vehicles exclusively within the limits of incorporated cities in the state, and said motor vehicles do not use any public highway, except the said streets; the plaintiffs must use said motor vehicles on said streets in order to carry on their business. (R. 3.)

The State of California enacted the "California Vehicle Act" being Chapter 226, Statutes of 1923, as amended by Chapter 240, Statutes of 1925, and by Chapters 752, 844 and 864, Statutes of 1927. The defendant has the sole jurisdiction, and it is his duty to enforce all the provisions of said act. (R. 29, 30, 37.) Every owner of a motor vehicle, trailer or semi-trailer is compelled to register the vehicle. The correct fees must be paid or any owner will be punished by a fine or imprisonment or both, and also the defendant can seize the vehicle and sell the same. The registration fee is $3.00 per year on each vehicle, being subdivision (a) of Section 77; every electric vehicle must pay a fee, in addition to said $3.00, of $10.00, and if said electric vehicle is used for passengers for hire or for transporting property must pay in advance from $50.00 to $90.00, depending upon the weight, being subdivision (b) of said Section 77; by subdivision (c) of said Section 77, every owner must pay in advance, in addition to said $3.00, from $15.00 to $70.00, depending upon the weight of every motor vehicle which is used for transporting passengers for hire or for transporting property. Vehicles not equipped wholly with pneumatic tires must pay twice the said fees in said subdivision (c) or fees of from $30.00 to $140.00 per vehicle; also fees are charged manufacturers and dealers, for duplicate

plates or certificates and for owners and chauffeurs. Counties and cities have power to regulate vehicles and to license the same. The defendant shall deposit in the State Treasury to the credit of the motor vehicle fund all moneys collected during the preceding day. A motor vehicle fund was created. From said motor vehicle fund not more than 25 per cent can be used for regulation and expenses, and one-half of the balance of said funds is paid over to the counties in proportion to the number of vehicles registered in said counties and the state receives the balance. The counties must expend all of said moneys exclusively in the construction and maintenance of public roads, bridges and culverts in said counties, and the state's share must be expended solely for the maintenance, repair, widening, resurfacing and reconstructing of state highways. (R. 3, 4, 5.) The Supreme Court of California has interpreted the said subdivisions (b) and (c), as aforesaid, and declared the sole purpose was to exact said charges on motor vehicles using the public highways, so as to raise funds to improve and repair said highways, and that the money so collected was a charge for the use of said highways by vehicles transporting passengers for hire or transporting property. (See *Old Homestead Bakery v. Marsh,* (242 Pac. 749) (75 Cal. App. 247) affirmed by the Supreme Court.) That such exactions, being charges for the use of said highways, are "tolls." (R. 5.)

The cities have enacted ordinances for the purpose of charging those vehicles, trailers and semi-trailers which transport passengers for hire or property for the cost of regulation and for revenue before they

can use said streets, in addition to charges under the said subdivisions (b) and (c) of said Section 77. Said annual charges vary from $5.00 to $42.00, depending upon the city. Seventy-five per cent of the moneys so collected has been and will be applied to maintenance and repair of said streets. (R. 5, 6.)

Said plaintiffs and said others must pay said state exactions before January 31, 1929, before they can use the said streets by the said vehicles, in order to escape said fines or imprisonment, or both, together with the seizure of said equipment and sale thereof, and moreover, their business will be destroyed at their irreparable loss, damage and injury. Said defendant, solely under color of his office, as aforesaid, threatens to and will enforce said provisions of said "California Vehicle Act," especially said unconstitutional subdivisions (b) and (c) of said Section 77, against the plaintiffs and all others similarly interested or situated, unless restrained by the order of the Court. (R. 6.)

Said subdivisions (b) and (c) of Section 77 of the "California Vehicle Act," being Chapter 266, Statutes of 1923, as amended, and said actions of the defendant in enforcing said illegal subdivisions (b) and (c), as aforesaid, were void and unconstitutional, being contrary to and in violation of the Constitution of the United States, especially the Fourteenth Amendment thereof and the Constitution of the State of California, the protection of all of which the plaintiffs and all said others similarly interested or situated pray. (R. 6.) Plaintiffs and all said others

have no plain, adequate and complete remedy at law. (R. 6, 7.)

The matters involved exceed in value the sum of $3000.00, exclusive of interest and costs. (R. 7.)

Plaintiffs and all said others pray for an interlocutory injunction restraining the defendant, as aforesaid, from in any way or manner enforcing or threatening to enforce said subdivisions (b) and (c) of said Section 77 of the "California Vehicle Act," as aforesaid, and that the Court will proceed to call in two additional Judges, one of whom to be a Circuit Judge, for the purpose of hearing and determining the application for said interlocutory injunction under the provisions of Section 266, as amended, of the Judicial Code, and further upon the final hearing thereof said Statutory Court hear and determine that said subdivisions (b) and (c), as aforesaid, are void and unconstitutional, and that said defendant be forever enjoined and permanently restrained from enforcing said illegal, void and unconstitutional subdivisions (b) and (c) of said Section 77, as aforesaid, and further for all other, proper and further relief that may be just and equitable in the premises, and for costs and disbursements. (R. 7, 8.)

Said motion with affidavit for an interlocutory injunction was filed and presented to the Court on the same day the bill of complaint was filed, to wit, December 29, 1928. The affidavit shows: that during the year of 1928 the defendant had collected more than $5,000,000.00 from subdivision (a) from the registration fees, and more than $2,668,000.00 from sub-

divisions (b) and (c), and more than $400,000.00 from the fees of chauffeurs and owners; that defendant could not expend more than 25% of the money so collected and more than $6,000,000.00 will be divided equally between the counties and the state; that all of the money received by the state, as aforesaid will be expended in the maintenance and repair of the Federal Aided Highways, and the counties' share will be expended on the maintenance and repair of county roads; that during the year 1929 by reason of said amendment of Section 77, the collections from said subdivisions (b) and (c), the defendant will collect more than $2,000,000.00 in addition to the collections during the year 1928; that the plaintiffs and all others similarly interested or situated will pay at least 75% of the funds collected from said subdivisions (b) and (c). (R. 8, 9, 10.)

Proper notice of the hearing on said motion before the Statutory Court was served upon the Governor, the Attorney General and Frank G. Snook, defendant. (R. 10, 11.)

Plaintiffs on behalf of themselves and all said others made an application for a restraining order commanding and directing the defendant from enforcing or threatening to enforce said subdivisions (b) and (c), as aforesaid, until the hearing and determination of the hearing on the motion for an interlocutory injunction. Motion was based upon the record and affidavit in support. (R. 11, 12, 13.)

The Court on January 30, 1929, granting said restraining order finds that irreparable damage would follow unless the order was granted, and by said re-

straining order the defendant could not expend, disburse or deposit in the State Treasury all moneys collected from said subdivisions (b) and (c), aforesaid, but all said money shall be held intact, subject to any order to be made thereafter, and until the hearing and determination of said motion for said interlocutory injunction to be heard on February 6, 1929. (R. 14.)

The defendant on January 25, 1929, filed a motion to dismiss the bill of complaint. (R. 14, 15.)

On February 13, 1929, the said Statutory Court filed its opinion. The following excerpts show that, "The plaintiff * * * operating motor vehicles exclusively within the limits of incorporated cities of the state and make no use of the highways of the state, except the streets of the cities in which they operate. The defendant is Chief of the Division of Motor Vehicles in the state and by virtue of his office is charged with the duty of enforcing the provisions of the Motor Vehicle Act. Section 77a of the Act prescribes a registration fee of $3.00 for the registration of every vehicle, trailer or semi-trailer, except those which are exempt by the Act, to be paid at the time application is made for registration. Section 77b prescribes an additional registration fee for the registration of every electric motor vehicle designed, used, or maintained primarily for the transportation of passengers for hire or for the transportation of property; the additional fee varies from $50.00 to $90.00 depending upon the weight of the vehicle. Section 77c prescribes an additional registration fee for the registration of vehicles, including

trailers and semi-trailers, designed, used or maintained primarily for the transportation of passengers for hire or for the transportation of property; the additional fee varying from $20.00 to $70.00, depending upon the weight of the vehicle; but the additional fee prescribed by this subsection need not be paid for electric vehicles. Section 51 declared it shall be unlawful and constitute a misdeameanor for any person to operate * * * any motor vehicle, trailer or semi-trailer upon a public highway, which shall not be registered, or for which the registration fees have not been paid, when as required by the provisions of the Act. Section 21 defines public highway * * * Section 159 of the Act creates in the State Treasury a Motor Vehicle Fund in which is deposited all moneys received from registration fees and some other sources. One half the net receipts from this fund is appropriated and authorized to be paid from the Motor Vehicle Fund to the counties of the state in proportion to the number of vehicles registered in such counties as determined by the places of residence of the owners to whom the registration certificates are issued * * *. In addition to the foregoing fees, the complaint avers that the incorporated cities of the state have enacted ordinances exacting license taxes and fees on motor vehicles, trailers and semi-trailers using the streets of the cities for transportation of passengers or property for hire; the amount of the tax or fee varying from $5.00 to $42.00 per motor in the different cities.

The plaintiffs challenge the validity of those portions of the Act imposing a tax or registration fee on

the vehicles owned and operated by them within the corporate limits of the several municipalities of the state on the ground that the fee is in the nature of a toll for the use of the highways, and inasmuch as the plaintiffs make no use of the highways outside of the municipalities and are taxed for such use by the municipalities the exaction of the state violates the Fourteenth Amendment to the Constitution of the United States. This broad contention cannot be sustained. In the lawful exercise of its acknowledged police power, the states may, beyond question, exact registration fees from owners and users of motor vehicles, varying with their horsepower or weight, regardless of the extent or place of use, so long as the vehicles are or may be used on public highways of the state."

The opinion cited two cases, one *Hendrick v. Maryland*, 235 U. S. 410-412, and the other *Kane v. New Jersey*, 242 U. S. 160-7.

> "For these reasons we are of the opinion that, the registration fee imposed by the state is a vaild exercise of the police power of the state and violates no provisions of the Constitution of the United States. Whether the fee or tax imposed by the municipalities for the like use is valid or not, we need not inquire because its validity is not questioned.
>
> The decree or order heretofore entered granting a preliminary injunction, is therefore dissolved and the bill of complaint is dismissed for want of equity.
>
> Let the decree be entered accordingly." (R. 16, 17, 18, 19.)

On same day, to wit, February 13, 1929, the Statutory Court entered on order reciting:

"that said application for an injunction be and the same is hereby denied; the preliminary injunction heretofore issued herein is and the same is hereby dissolved, and motion to dismiss be and the same is hereby granted and the cause dismissed. Further ordered that a decree be signed, filed and in form as substituted, dismissing cause and for costs." (R. 19.) A decree "it was ordered, adjudged and decreed as follows, viz:

1. That the preliminary injunction heretofore granted and issued in the above entitled cause be and the same is hereby dissolved.

2. That the bill of complaint herein be and the same is hereby dismissed for want of equity.

3. That the defendant have and recover of and from the plaintiffs his costs to be taxed and the execution issued therefore." (R. 20.)

On February 23, 1929, plaintiffs served on the defendant a motion to amend together with a proposed amended bill of complaint to be heard on February 25, 1929. (R. 28.)

Said motion to file and amended bill of complaint was filed. (R. 20, 21.)

The said proposed amended bill of complaint contained similar averments in the bill of complaint and also shows: That Congress had enacted on July 11, 1916, the "Rural Post Act." The State of California in 1917 had assented to and agreed to abide by the provisions of said "Rural Post Act." Thereafter in 1921 Congress amended and supplemented said Act by the "Federal Highway Act." The Federal Government has since 1917 paid over to said state many millions of dollars under said Acts for the construction or reconstruction of highways and in the future will pay additional millions. That said Federal money

has been expended on the highways of the state or county roads for the construction or reconstruction of portions of said highways. Every state highway or county road is a rural post road and comes within the provisions of said Federal Acts. One of said provisions provided:

> "That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds." (R. 21, 22.)

"California Vehicle Act" of 1923 was amended by Chapter 844, Statute of 1927. All owners must make an application for registration showing whether the vehicle, trailer or semi-trailer is for private use or for the transportation of passengers for hire, or for transportation of property, or exempted by the Act. Every vehicle, trailer or semi-trailer must pay $3.00 per year under subdivision (a) of said Section 77, as aforesaid; and every electric vehicle must pay $3.00 and $10.00 additional when for private use, but if said electric vehicle is used for the transportation of passengers for hire or for the transportation of property another additional fee was exacted according to the following schedule: less than 6000 pounds, $50.00; less than 10,000 pounds, $70.00; 10,000 pounds or over, $80.00; as provided for in subdivision (b), as aforesaid. Subdivision (c), as aforesaid, provides that in addition to said $3.00 registration fee every motor vehicle, trailer or semi-trailer, except electric vehicles used for the transportation of passengers for hire or for the transportation of property, must pay an additional fee according to the following table:

> "When such vehicles are equipped wholly with pneumatic tires"—"unladen, three thousand

> pounds or more and less than six thousand pounds, $15.00;" unladen 6000 pounds or more, but less than 10,000 pounds and limited to a total weight, including vehicle and load, not to exceeding 22,000 pounds, $40.00; unladen, 10,000 pounds or more, a total weight, including vehicle and load, not exceeding 22,000 pounds, $50.00; unladen, 6000 pounds or more and a total weight, including vehicle and load, in excess of 22,000 pounds, $70.00."

When pneumatic tires are not used, then said fees are doubled. Said amendment went into force and effect for the year 1929, and the fees provided for in subdivision (b) were increased 25%, while the fees in subdivision (c) were increased about 250%, and further said amendment repealed the clause in subdivision (c), to wit:

> "For each such vehicle weighing, when unladen, less than 3000 pounds $10.00."

By such amendment many thousands of vehicles transporting passeengers for hire or property have been freed from said fees, although said vehicles weigh more than 6000 pounds when loaded. Every vehicle, trailer and semi-trailer coming within the provisions of said subdivisions (b) and (c) must have special number plates. Defendant collected about $5,200,000.00 from subdivision (a) for 1928, and plaintiffs and all said others, except those exempted were forced to pay in advance said amount, and in addition collected about $2,668,000.00 from said subdivisions (b) and (c). That the entire cost for enforcing and regulating said "California Vehicle Act" was less than $1,700,000.00 and about $6,000,000.00, the

net proceeds, will be equally divided between the state and counties. (R. 22, 23, 24.)

The Supreme Court of California has interpreted said subdivisions (b) and (c), as aforesaid, and declared that the whole purpose was to create a fund to maintain and repair the highways outside of the limits of cities and to receive compensation for the use of said highways by motor vehicles. Said fees are exacted as revenue measures. The plaintiffs allege said fees exacted under said subdivisions (b) and (c), as aforesaid, are "tolls," prohibited by said Federal Aid Legislation and further every cent collected has been expended for the maintenance and repair of said Federal Aided Highways. (R. 9, 25.) The cities have enacted ordinances exacting fees on motor vehicles, trailers and semi-trailers transporting passengers for hire or property using their streets. Said fees vary from $5.00 to $250.00, according to weight and depending upon the city. Said fees were enacted for the purpose of regulation and for revenue. The cost of regulation is about 25% of the money collected, and 75% is expended for the maintenance and repair of said streets. All said fees charged are in addition to fees charged under said subdivisions (b) and (c), as aforesaid. (R. 5, 6, 25.) Plaintiffs are taxpayers and offered to pay said registration fee of $3.00 under subdivision (a), as aforesaid, but the defendant has refused to accept said money, unless they pay in addition the charges in said subdivisions (b) and (c), as aforesaid. Plaintiffs and said others use exclusively the streets of cities and have paid to said cities, as aforesaid, said "tolls" for the privilege of using said

streets. (R. 5, 25, 26.) Plaintiffs must pay on or before January 31, 1929, said fees in said subdivisions (b) and (c) of said Section 77 to obtain said special number plates before using said streets, or they will be fined or imprisoned, or both, and their vehicles seized and sold as threatened by the defendant; and they will be compelled to in the future buy additional vehicles in order to take care of their business and will be forced to pay said fees on their additional vehicles. (R. 4, 6, 26.)

The defendant, under coler of his office, will collect during the year 1929 at least $4,000,000.00 alone from said fees exacted by said subdivisions (b) and (c) of said Section 77, and will issue said number plates; 75% of said amount so collected from these plaintiffs and those persons, firms, associations and corporations similarly interested or situated who operate their vehicles exclusively on the streets of cities; the defendant will not and cannot collect any fee from any owner or operator of a vehicle weighing, unladen, less than 3000 pounds, no matter if the weight of the vehicle and load exceed 6000 pounds, and he will not and cannot issue said number plates; there are many thousands of vehicles transporting passengers for hire or transporting property that are relieved from said fees. (R. 4, 26.)

Plaintiffs and said others allege that the enforcement of said unconstitutional subdivisions (b) and (c), as aforesaid, by said defendant, will not only cause said plaintiffs and said others irreparable loss and damage, but also their business will be irreparably destroyed by said thousands of vehicles without

the payment of any of said fees being in direct competition with the plaintiffs and said others; also the money so collected is expended on said Federal Aided Highways for the owners of land adjacent to said highways to the irreparable loss and injury of said plaintiffs and said others who receive no benefit from such expenditures. (R. 6, 26, 27.) The plaintiffs and said others allege that said subdivisions (b) and (c) of Section 77 of the "California Vehicle Act," Chapter 266, Statutes of 1923, as amended by Chapter 844, Statutes of 1927, and the actions of the defendant, as Chief of the Division of Motor Vehicles, in enforcing said illegal subdivisions (b) and (c), as aforesaid, are unconstitutional and void being contrary to and in violation of the 14th Amendment of the Federal Constitution, as well as the Constitution of the State of California, prohibiting the making or enforcement of any law which shall abridge the privileges and immunities of citizens, or which shall deprive any persons of life, liberty or property without due process of law, or denies to any person the equal protection of all of which the plaintiffs and all said others pray. (R. 6, 27.)

On March 25, 1929, said Statutory Court filed an order in which it "was ordered that the motion to set aside the decree be and the same is hereby denied."

A proper appeal was perfected to this Court. (R. 29, 30.)

SPECIFICATION OF ERRORS.

I.

The Court erred in dissolving the preliminary injunction.

II.

The Court erred in refusing and denying the application for an interlocutory injunction.

III.

The Court erred in granting the motion to dismiss the bill of complaint and dismissing the bill of complaint.

IV.

The Court erred in deciding that subdivisions (b) and (c) of Section 77 of the "California Vehicle Act," being Chapter 226, Statutes of 1923, as amended by Chapter 844, Statutes of 1927, are police measures.

V.

The Court erred in refusing to be bound by the meaning of said provisions of said subdivisions (b) and (c) of Section 77 of the said "California Vehicle Act" as interpreted by the Supreme Court of California.

VI.

The Court erred in refusing to decide that the exactions under said subdivisions (b) and (c) of Section 77 of the "California Vehicle Act" being Chapter 266, Statutes of 1923, as amended by Chapter 884, Statutes of 1927, were "tolls."

VII.

The Court erred in deciding that said subdivisions (b) and (c) of Section 77 of the "California Vehicle Act," being Chapter 266, Statutes of 1923, as amended by Chapter 844, Statutes of 1927, and the acts and threatened acts of the defendant in enforcing said subdivisions do not violate any provisions of the Constitution of the United States, but that the said subdivisions and said acts are constitutional and legal.

VIII.

The Court erred in refusing to take into consideration that the plaintiffs and all others similarly interested or situated are now operating their vehicles carrying passengers for hire or property and must operate said vehicles in order to carry on their business; and their said vehicles do not operate on any public highways outside of cities, but they operate exclusively within the limits of cities using the streets thereof.

IX.

The Court erred in refusing to decide that the plaintiffs and all others similarly interested or situated must pay in advance the amount of money called for under said subdivisions (b) and (c) of Section 77 of said "California Vehicle Act" before they can use the streets of cities by their vehicles. Further all of said amount of money was collected by said defendant so as to create a fund to improve and repair the public highways outside of the limits of cities and said exactions under said subdivisions are "tolls."

X.

The Court erred in refusing to decide that the cities have enacted ordinances exacting license fees, depending upon the weight, on motor vehicles, trailers and semi-trailers transporting passengers for hire and property using the streets which said ordinances are constitutional, being protected by the Constitution of the State, as interpreted by the State Supreme Court. Said ordinances were enacted to create funds to pay the cost of regulating said motor vehicles and also for revenue; and that 75% of the proceeds derived therefrom is used for the maintenance and repair of said streets; and said license fees are "tolls."

XI.

The Court erred in refusing to protect the plaintiffs and all said others in the use of their vehicles in transporting passengers for hire or property exclusively on the streets of cities; against the enforcement of said subdivisions (b) and (c) of Section 77 of the "California Vehicle Act," in order to escape heavy fines or imprisonments or both, and the seizure of their vehicles, as said subdivisions (b) and (c), as aforesaid, are unconstitutional.

XII.

The Court erred in refusing to decide that said subdivisions (b) and (c), as aforesaid, and the acts of the defendant in enforcing the same were unconstitutional and void, being contrary to and in violation of the due process and equal protection clauses of the 14th Amendment of the Federal Constitution, as well as the State Constitution.

XIII.

The Court erred in refusing to permit the plaintiffs to file and present an amended bill of complaint in order to allege the matters set out in the affidavit in support of the motion for the interlocutory injunction and also to show that only $1,700,000.00 was the cost of the regulation which sum was less than 20% of the amount collected under said subdivisions A, B and C; also to show that there are many thousands of motor vehicles, trailers and semi-trailers whose weight, when unladen, being less than 3000 pounds are freed from the payment of said exactions provided for in said subdivision C even though their weight, when laden, exceeds 6000 pounds; that the owners and operators of said vehicles weighing unladen less than 3000 pounds are in direct competition with the plaintiffs and all others similarly interested or situated; that the plaintiffs and said others are being daily damaged and their businesses will be irreparably damaged by said competition; that all of the net proceeds of the said money so collected are expended on the Federal Aided Highways for the benefit of the owners of the land adjacent to those highways and that the plaintiffs and all said others received no benefit from the said expenditures.

ARGUMENT.

I.

THE APPELLANTS INSTITUTED THE ACTION ON BEHALF OF THEMSELVES AND ON BEHALF OF OTHERS SIMILARLY INTERESTED OR SITUATED. A CLASS SUIT.

The appellants have been and now are using the vehicles mentioned in paragraph 1 (R. 2, 3), so as to carry on their business and said vehicles transporting passengers for hire or transporting property do not use any public highway, except the streets of the incorporated cities. The appellants instituted this action on behalf of themselves and also on behalf of the owners or operators of the many thousands of vehicles, trailers and semi-trailers operated exclusively within the limits of incorporated cities transporting passengers for hire or transporting property who must use said streets in order to carry on their business. (R. 6, 7.)

Rule 38 of Equity Rules of Supreme Court.

II.

THE CHARGES TO BE COLLECTED IN ADVANCE BY THE APPELLEE UNDER THE PROVISIONS OF SUBDIVISIONS (B) AND (C) OF SECTION 77 OF THE "CALIFORNIA VEHICLE ACT," AS AMENDED, ARE "TOLLS."

The sole purpose of said provisions of said subdivisions (b) and (c) of said Section 77 was to raise funds with which the highways may be constructed, improved and repaired. The following excerpts show that the California Courts have interpreted said provisions:

"Of course the purpose of the legislation exacting license taxes for motor vehicles operated over the public highways is to raise funds with which such highways may be improved and kept in repair in such manner as suitable to the mode of transportation peculiar to motor vehicles. The theory of such a tax, particularly under present day conditions as the character of the highways required and the great expense in constructing and maintaining them, is, manifestly, that it is only just and proper that those who use the public highways either for business purposes or for pleasure should bear the expense of keeping in repair those already improved * * *, and to contribute to the construction of new roads * * *, the burden thus imposed upon motor vehicles or the owners and operators thereof, considering, of course, the particular use which such vehicles are put, their weight, and such other elements as might properly enter into determination of the probable effect, as to the matter of 'wear and tear,' the use of each of the various classes the various vehicles would have upon the roads. * * *

"The expense of maintaining the public highways from the greatly increased use and consequently wear and tear to which thus the highways now are and have been subjected, has of necessity proportionately been increased, and, must naturally, if, * * * the greatly enhanced cost of improving and keeping in proper repair the highways * * *, in bearing the burden necessarily coincident with the work of improving and maintaining the public highways * * *."

Old Homestead Bakery v. Marsh, 75 Cal. App. 247, 242 Pac. 749;

This case was affirmed by the Supreme Court on January 24, 1926.

The Supreme Court of California has held that a turn pike company can charge tolls for the cost of

construction and the Supreme Court in its opinion said:

> "All the interest that the company had in the matter was by reason of the fact that it had the right and power to collect tolls on the line of the road, as a compensation for the public service it had performed by opening a public road for the public good. In legal theory, "A turnpike is a public highway, established by public authority for public uses, and is to be regarded as a public easement, and not as private property. The only difference between this and the common highway is, that instead of being made at the expense in the first instance; and the cost of construction and maintenance is reimbursed by a toll levied by public authority for this purpose. Every traveler has the same right to use it, paying the toll established by law, as he would have to use any other public highway." (Commonwealth v. Wilkinson, 16 Pick. 176.)"
>
> *Wood et al. v. Truckee Turnpike Company,* 24 Cal. 474, 490.

The Supreme Court in an opinion said:

> "If the Legislature may allow the taking of tolls as a compensation for building a road, it seems necessarily to follow that it may allow a like franchise as compensation for keeping it in repair—which is the purport of the statute now under view, and such is the rule, although the result may be to take away a previous right in the public to pass toll free."
>
> *Blood v. McCarty,* 112 Cal. 561, 564.

The Supreme Court of California in the *Matter of Application of Schuler,* 167 Cal. 282, in interpreting the "Motor Vehicle Act" approved May 31, 1913, said that two of the cases cited would be followed, one the case of *Kane v. State,* 81 N. J. L. 594, 80 Atl. 453.

The other was the case of *Fort Smith v. Scruggs,* 70 Ark. 549, 69 S. W. 679.

We cited the following excerpt in the *Kane* case:

> "A state may do these things because, having expended moneys, either itself or by the agencies created by it, in increasing the facilities which commerce, either interstate or intrastate, may be carried on, it is entitled to charge a fair remuneration for the outlay made by it, and for the maintenance of the public works it has constructed.
>
> "A very ordinary example of the exercise of this power is the construction of public roads known as turnpikes by agencies created by the state, for the use of which tolls are permitted to be charged to persons using the same. Such public roads are open to the use of every person desiring to travel upon them upon payment of the tolls authorized to be charged.
>
> "Although, ordinarily, turnpikes are built and owned by corporations created by the state, for the purpose of constructing and maintaining them, what the state may do indirectly through such agencies it may do directly; that is, it may itself lay out and construct such improved public roads, and charge reasonable tolls to all persons using the same, without regard to the character of the business for which they are being used. And this is practically what New Jersey is now doing."
>
> *Kane v. State,* 81 N. J. L. 594, 80 Atl. 453.

The Supreme Court of the United States affirmed the judgment of the New Jersey Court that registration fees were exacted as "tolls."

> *Kane v. New Jersey,* 248 U. S. 160, 61 L. Ed. 222.

The other case cited in the *Schuler* case is one that arose in Arkansas on a license ordinance. The Supreme Court of the state held the ordinance was a license fee, a toll. The following excerpt in the opinion:

> "The license fee imposed is, then, not a tax upon property, but is in the nature of a toll for the use of the improved streets. In other words, it is the privilege of using vehicles on the improved streets, and not the vehicle itself, that is taxed."
>
> *Ft. Smith v. Scruggs,* 70 Ark. 549, 69 S. W. 679.

The above decisions of the State Supreme Court show: The sole purpose of the subdivisions (b) and (c), as aforesaid, was to receive compensation for the use of public highways by motor vehicles, trailers and semi-trailers transporting passengers for hire or transporting property, and the money so collected is to be expended exclusively in the construction, maintenance and repair of public highways; if the state had granted franchises to private corporations or persons to construct public highways, then such corporations or persons are entitled to collect reasonable "tolls" for the construction, maintenance and repair of said public highways; the state may and has constructed improved public highways and has charged "tolls," as the charges in said subdivisions (b) and (c), as aforesaid, are "tolls."

In addition to the above decisions of the State Supreme Court, we will cite a few decisions of the U. S. Supreme Court and of other State Supreme Courts

which show that the charges in said subdivisions (b) and (c), as aforesaid, are "tolls."

This Court had occasion to pass on the question of the meaning and effect of the word "toll" in connection with a toll-bridge across a river. This Court held that turnpikes, railroads, bridges and ferries are public highways and the right to take toll is granted as compensation for erecting such works of internal improvement. The toll is a sum demanded for a passage on a highway, ferry, bridge, etc., and such toll can be demanded in consideration for such passage.

Comrs. of Dodge Co. v. Chandler, 6 Otto. 205, 24 L. Ed. 625.

The construction of a statute of Michigan, in which certain improvements had been made in the Manistee River so as to remove obstacles hindering the floating of logs and lumber, was involved. The respondent, the Improvement Company, brought an action against the plaintiff in error to recover tolls on such river. Mr. Justice Field, in delivering the opinion of the Court, said:

> "There is no analogy between the imposition of taxes and the levying of tolls for improvement of highways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading. Taxes are levied for the support of the government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property, or of the improvements and considerations of the return which such values or expenditures should yield. * * *
>
> "And to meet the cost of such improvement, the states may levy a general tax or lay a toll upon

all who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. Huse v. Glover, 119 U. S. 543, 548 (30:487.)"

Sands v. Manistee River Improvement Co., 123 U. S. 288, 294, 31 L. Ed. 149, 151.

The Supreme Court again declared that tolls for passage through locks and the use of wharves and booms were compensation for the use of artificial facilities constructed. Citing *Huse v. Glover,* 119 U. S. 543, 548, 30 L. Ed. 487, 490; *Sands v. Manistee River Improv. Co.,* 123 U. S. 288, 297, 31 L. Ed. 149; also *Mobile County v. Kimball,* 102 U. S. 691, 26 L. Ed. 238.

Lindsay & Phelps Co. v. Mullen, 176 U. S. 126, 44 L. Ed. 400.

This Court held that the highways of the state, whether on land or by water, may be improved and a charge of a reasonable toll can be collected by the state as compensation for the use of such improved highways.

Huse v. Glover, 119 U. S. 543, 30 L. Ed. 487.

In the absence of Congressional action, the State of Pennsylvania had the power, either itself or through a corporation which it chartered, to improve the navigation of the Monongahela River by means of tolls for the use of such improvement.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. Ed. 463.

In delivering the opinion Mr. Justice Hughes said:

> "While the state may not impose a duty of tonnage (citing cases), it may regulate wharfage charges and exact tolls for the use of artificial facilities provided under its authority."

Under such announcement a large number of cases were cited, to-wit: *Transportation Company v. Parkersburg,* 107 U.S. 691, 27 L. Ed. 584; *Huse v. Glover,* supra; *Sands v. Manistee River Im. Co.,* supra.

Simpson v. Shepard (Minnesota Rate Cases), 230 U. S. 352, 405, 57 L. Ed. 1511, 1544.

Mr. Justice Reynolds, in delivering the opinion of this Court said:

> "In view of the many decisions of this Court there can be no serious doubt that where a state at its own expense, furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard, the constitute no burden on interstate commerce. Parkersburg &. O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 699, 27 L. ed. 584, 587, 2 Sup. Ct. Rep. 732; Huse v. Glover, 119 U. S. 543, 548, 549, 20 L. ed. 487, 490, 7 Sup. Ct. Rep. 313; Monongahela Nav. Co. v. United States, 148 U. S. 312, 329, 330, 37 L. ed. 463, 469, 13 Sup. Ct. Rep. 622; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 405, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, and authorities cited."

Hendrick v. Maryland, 235 U. S. 610, 624, 59 L. Ed. 385, 391.

In the *Hendricks* case, as well as the *Kane* case, the plaintiffs demanded protection under the Commerce Clause, and this Court held that the Commerce Clause would not protect them as the exactions were "tolls."

The Justices of Massachusetts rendered an opinion on a proposed license law. An excerpt of the opinion follows:

> "In the early days of the commonwealth many, if not most of the highways were built and maintained by private enterprise through turnpike corporations established by law and dependent for their support upon tolls charged to travelers. Bridges were built and maintained in the same way. Ferries were operated either in the same way or by municipalities, which collected tolls for their use. All highways and bridges, so far as we are aware, and some of the ferries, have been acquired by the commonwealth, or by counties, cities or towns. * * * The free use of all highways has been provided at the expense of the public treasury for many years in this commonwealth. This has not always been the custom. It is comparatively modern.
>
> "(2) The power of government to take, acquire or construct instrumentalities for public travel, to charge toll, rental or other recompense therefor is illustrated in several decisions. Commonwealth v. Wilkenson, 6 Pick. 175, 29 Am. Dec. 654; George G. Fox Co. v. Boston & Northern Street Railway, 217 Mass. 140, 142, 140 N. E. 356; Boston v. Treasurer and Receiver General, 237 Mass. 403, 414, 130 N. E. 390, and cases there reviewed.
>
> "If and so far as such tolls or rentals are based upon fair recompense for initial construction and for adequate maintenance, they do not involve the power for taxation. The power proposed to be

exercised in the present bill is not of that nature. Avowedly an excise tax is established. * * *

"Toll—at that time a word in common use in connection with turnpikes and bridges—thus was mentioned more than 100 years ago in the first decision requiring a critical consideration of the meaning of the word "commodities" in the Constitution as an illustration of an excise. * * *

" 'Toll' is the apt word to describe the collection of money for the use of a highway or bridge.

"(3, 4) There are appearances of inequality about a toll upon the use of highways by motor vehicles. The fact that no toll is charged for the use of highways by other kinds of vehicles bears a superficial likeness to discrimination against motor vehicles. It is a matter of common knowledge that the number of motor vehicles vastly exceed all others and that a different highway construction as to durability and smoothness is required for their convenience. * * *

"There is no general provision in the proposed bill for charging toll for motor vehicles owned by non-residents when used upon the highways of the commonwealth. That, too, may be found to be small in comparison with domestic use. * * *

"(5) A modern instance of the collection of toll by way of excise tax is found in G. L. C. 63 Par. S. 62-66, for the operation of street railways in public ways. Collector of taxes against Bay State Street Railway, 235 Mass. 330, 125 N. E. 614. The collection of a tax levy by way of tollage or license for the use of public ways by motor vehicles has been upheld in other jurisdictions. (In support of such announcement, a large number of cases were cited, including Kane v. New Jersey, supra; Pierce Oil Corporation v. Hopkins, supra; Standard Oil Co. v. Brodie, supra; Hendrick v. Maryland, supra; in re Ops. of the Justices of New Hampshire, supra.) * * *

"As a matter of abstract principle we are of opinion that it is within the constitutional power

of the General Court to levy an excise as a toll for the use of public ways by motor vehicles. * * *

"The proposed bill is a revenue measure. It is not exacted in the exercise of the police power. * * *

"(6) * * * An examination of the proposed bill plainly shows that it provides for an excise for the use of highways and not a property tax."

In re Ops. (Mass.), 250 Mass. 591, 146 N. E. 651. (Decided January, 1925.)

In the opinion the following excerpt is set out:

"When so empowered by the Legislature, requiring the payment of a property or reasonable graduated tax, as in the case at bar, which must be considered in the nature of a toll imposed for the exercise of the privilege of using the streets by the means of vehicle. In fact, the right of exacting the payment of such a license tax is akin to the principle by which the establishment of toll roads over public highways by virtue of legislative authority, and the right to collect toll from persons traveling in vehicles thereon, is sustained."

Tomlinson v. Indianapolis, 144 Ind. 142, 43 N. E. 9.

Again the Supreme Court of Indiana held that an ordinance of Terre Haute was a "toll" as the money collected under the license was expended to maintain and repair the streets. The Supreme Court held that the ordinance was a revenue measure.

Terre Haute v. Kersey, 159 Ind. 300, 64 N. E. 469.

The Supreme Court of Indiana again held an ordinance was valid in which a licence fee was enacted

for the use of the streets by vehicle, and said charges were "tolls."

> "This requirement is consistent with reason and justice for it is a well recognized fact that it is the use of vehicles on the streets of a city which in the main cause the wear and tear of such streets, and the tax exacted is authorized and intended by the statute to reimburse the city, in part at least, for the great expense to which it is subjected in the maintenance and repair of its public streets."
>
> *Hogan v. Indianapolis,* 159 Ind. 523, 65 N. E. 525.

To the same effect:

A license fee charged and collected for the use of public highways by motor vehicles and the money received from such fees expended on such highways, is a "toll."

Re Hoffert, 34 S. D. 271, 148 N. W. 20;
Ex parte Kessler, 26 Idaho 764, 145 Pac. 113;
State v. Ingalls, 38 N. M. 211, 135 Pac. 1177.

We submit that said provisions of said subdivisions (b) and (c), as aforesaid, are "tolls."

III.

THE SAID SUBDIVISIONS (B) AND (C) OF SAID SECTION 77 OF THE "CALIFORNIA VEHICLE ACT," AS AMENDED, ARE REVENUE MEASURES, AND ARE NOT ENACTED AS POLICE MEASURES.

The lower Court in its opinion held:

> "For these reasons we are of opinion that the registration fee imposed by the state is a valid

exercise of the police power of state and violates no provisions of the Constitution of the United States. Whether the fee or tax imposed by the municipalities for like use is valid or not, we need not inquire because its validity is not questioned.

The decree or order heretofore entered granting a preliminary injunction, is therefore dissolved and the bill of complaint is dismissed for want of equity." (R. 16, 17, 18, 19.)

The lower Court filed and entered the order and decree; and said order and decree were based solely upon the reasons found in the said opinion. (R. 19, 20.)

We call attention of this Court to the admitted facts shown in the bill of complaint and the affidavit in support of the motion for interlocutory injunction.

Section 77 of the Act has been divided into different subdivisions. Subdivision (a) relates to the registration of every motor vehicle, trailer or semi-trailer, including electric vehicles, except exempted; subdivision (b) relates to the fees for electric vehicles and also that every such vehicle used for the transportation of passengers for hire, or for the transportation of property shall pay additional fees depending upon the weight; subdivision (c) relates to the additional fees for motor vehicles, including trailers and semi-trailers used for the transportation of passengers for hire or for the transportation of property according to the weight, and also that vehicles not equipped wholly with pneumatic tires shall pay twice the fees set forth in the table shown in subdivision (c). Section 159 permits not more than 25% of the moneys collected from the said registration and fees to be

used for the cost of regulation, including the maintenance of the Division of Motor Vehicles. (R. 3, 4, 5.)

The affidavit in support of the motion for the interlocutory injunction shows that more than $5,000,000.00 was collected from subdivision (a), and $2,668,000.00 from subdivision (b) and (c), and in addition the sum of $400,000.00 collected from chauffeurs' and operators' licenses, during the year of 1928. Not more than 25 per cent of said moneys so collected as aforesaid could be used for regulation and cost. That more than $6,000,000.00 is to be used as provided by Section 159, namely, for construction, maintenance and repairs. (R. 9, 10.)

The Supreme Court has interpreted the meaning of subdivisions (b) and (c), as aforesaid, as being revenue measures.

Old Homestead Bakery v. Marsh, supra.

The lower Court failed to give any value to the interpretation of said subdivisions made by not only the Supreme Court in the *Old Homestead Bakery* case, but also the decision in the *Matter of the Application of Schuler,* supra. The Federal Courts are bound by the interpretation of the meaning of said subdivisions.

Hanover F. Ins. Co. v. Carr, 272 U. S. 179, 71 L. Ed. 224.

Apply the principle announced by the State Supreme Court in the above cases.

It is admitted that not a cent collected from said provisions of said subdivisions (b) and (c) is to be used for the cost of regulation, including the cost of

the Motor Vehicle Division, as all of the money so collected, as aforesaid, is used in the construction, maintenance and repair of the state highways and the county roads, all of which have been constructed or reconstructed under the Federal Aid Legislation and have received Federal money therefrom. Therefore said subdivisions (b) and (c) cannot be sustained under the state police power.

This Court had before it the question of whether an ordinance exacting a license fee of $50.00 on every motor vehicle transporting passengers for hire using the streets of South Bend, Indiana, was based upon police powers of the state, or not. The State Supreme Court had sustained the validity of the ordinance under the state police power.

In delivering the opinion of the Court, Mr. Justice Brandeis said:

> "It is true that, in the absence of Federal legislation covering the subject, the state may impose, even upon vehicles using the highways exclusively in interstate commerce, non-discriminatory regulations for the purpose of insuring the public safety and convenience; that licensing or registration of busses is a measure appropriate to that end; and that a license fee no larger in amount than is reasonably required to defray the expenses of administrating the regulations may be demanded. Hendrick v. Maryland, 235 U. S. 610, 59 L. Ed. 385, 390, 35 Sup. Ct. Rep. 140; Kane v. New Jersey, 242 U. S. 160, 61 L. Ed. 222, 37 Sup. Ct. Rep. 30; Morris v. Duby, 274 U. S. 135, 71 L. Ed. 966, 47 Sup. Ct. Rep 548; Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 Sup. Ct. Rep. 702. Compare Hess v. Pawloski, 274 U. S. 352, 71 L. Ed. 1091, 47 Sup. Ct. Rep. 632. These powers may also be exercised by a city if author-

ized to do so by appropriate legislation. Compare Erb v. Morash, 177 U. S. 584, 585, 44 L. Ed. 897, 898, 20 Sup. Ct. Rep. 819; Mackay Teleg. & Cable Co. v. Little Rock, 250 U. S. 94, 99, 63 L. Ed. 863, 868, 39 Sup. Ct. Rep. 428. Such regulations rest for their validity upon the same basis as do state inspection laws, Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. Ed. 191, 18 Sup. Ct. Rep. 862; Red "C" Oil Co. v. Board of Agriculture, 222 U. S. 380, 56 L. Ed. 240, 32 Sup. Ct. Rep. 152, and municipal ordinances imposing on telegraph companies, though engaged in interstate commerce, a tax to defray the expense incident to the inspection of the poles and wires. Western U. Teleg. Co. v. New Hope, 187 U. S. 419, 47 L. Ed. 240, 23 Sup. Ct. Rep. 204; Postal Teleg-Cable Co. v. Richmond, 249 U. S. 252, 258, 63 L. Ed. 590, 594, 39 Sup. Ct. Rep. 265; Mackay Teleg. & Cable Co. v. Little Rock, supra. But it does not appear that the license fee here in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such purpose. It follows that the exaction of the license fee cannot be sustained as a police measure. Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 164, 47 L. Ed. 995, 999, 23 Sup. Ct. Rep. 817; Postal Teleg. Cable Co. v. New Hope, 192 U. S. 55, 48 L. Ed. 338, 24 Sup. Ct. Rep. 204; Barrett v. New York, 232 U. S. 14, 32, 58 L. Ed. 483, 491, 34 Sup. Ct. Rep. 203; compare D. E. Foote & Co. v. Stanley, 232 U. S. 494, 503, 58 L. Ed. 698, 701, 34 Sup. Ct. Rep. 377."

Sprout v. South Bend, 277 U. S. 163, 72 L. Ed. 529.

The State Supreme Court of Washington held that a license law was based upon the state police power.

This Court reversed the decree on the ground that the license law was in the nature of an inspection law, and, as the cost of regulation was only about 25 per cent of the money collected, the law could not be sustained under the police power.

Standard Oil Co. v. Graves, 249 U. S. 389, 63 L. Ed. 668.

We submit that said subdivisions (b) and (c), as aforesaid, cannot be sustained under the state police power. The question is whether said subdivisions can be sustained as revenue measures against the appellants and all others similarly interested or situated.

IV.

ALL CITIES ARE EMPOWERED BY THE STATE CONSTITUTION AND HAVE ENACTED LICENSE ORDINANCES COMPELLING OWNERS OR OPERATORS OF MOTOR VEHICLES USED IN TRANSPORTING PASSENGERS FOR HIRE OR PROPERTY TO PAY IN ADVANCE LICENSE FEES BEFORE USING THE STREETS THEREOF. THE CHARGES ARE "TOLLS."

Section 11 of Article XI of the Constitution of the State of California reads as follows:

> "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

Also Section 12, Article XI, is as follows:

> "The Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by

> general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

Under such powers the cities have enacted ordinances compelling the owners or operators to pay in advance license fees before they can use the streets of said cities by their motor vehicles transporting passengers for hire or property.

> *Bacon Service Corporation v. Huss,* 199 Cal. 21, 30;
> *In re Schmolke,* 199 Cal. 42, 47.

In enacting the "California Vehicle Act," the Legislature had in mind said above provisions of the Constitution when it adopted Section 145 of said Act which provided:

> "Sec. 145. Nothing in this Act contained shall be so construed as to prevent * * * and the legislative bodies of incorporated cities from providing by ordinance for the regulation of traffic * * *, nor from licensing and regulating the operation of vehicles offered to the public for hire," etc.

It is admitted that all the cities have passed ordinances exacting license fees on motor vehicles, trailers and semi-trailers transporting passengers for hire or property using the streets of said cities, and said fees must be paid in advance before using said streets. Said fees are in addition to the charges exacted under the provisions of said subdivisions (b) and (c) of said Section 77, as aforesaid. The fees charged by said cities vary from $5.00 to $42.00 per motor vehicle, trailer and semi-trailer, depending upon the city.

Said ordinances were enacted for the purpose of regulating said motor vehicles, trailers and semi-trailers, and also for revenue. Not less than 75 per cent of the money so collected from said fees has been and in the future will be applied to the maintenance and repair of said streets in said cities. (R. 5, 6.) Said charges as exacted by said ordinances of said cities, are "tolls."

We refer to our argument and the citations found in paragraph II of our brief in support of our position that said charges are "tolls."

V.

THE SAID SUBDIVISIONS (B) AND (C) OF SECTION 77 OF SAID "CALIFORNIA VEHICLE ACT," AS AMENDED, COMPELLING THE APPELLANTS AND ALL PERSONS, FIRMS, ASSOCIATIONS AND CORPORATIONS SIMILARLY INTERESTED OR SITUATED TO PAY SAID CHARGES ARE UNCONSTITUTIONAL AND VOID, BEING CONTRARY TO AND IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

Said subdivisions (b) and (c) of Section 77 of the "California Vehicle Act," being Chapter 226, Statutes of 1923, as amended by Chapter 844, Statutes of 1927, cannot be sustained under police power. We refer to the facts and the authorities on that question in paragraphs II and III.

Said provisions of said subdivisions cannot be sustained as excise taxes for the use of the cities' streets.

This Court has decided this question by the following excerpt of the decision in *Sprout v. South Bend:*

"It is true that a state may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways, Hendrick v. Maryland, 235 U. S. 610, 622, 59 L. Ed. 385, 390, 35 Sup. Ct. Rep. 140; Interstate Busses Corp. v. Blodgett, No. 197, decided February 20, 1928, (U. S., ante, 243, 48 Sup. Ct. Rep. 230.) And this power may be delegated in part to a municipality by appropriate legislation. Compare St. Louis v. Western Union Tel. Co., 148 U. S. 92, 98, 37 L. Ed. 380, 383, 13 Sup. Ct. Rep. 485, 149 U. S. 465, 37 L. Ed. 810, 13 Sup. Ct. Rep. 990. An exaction for that purpose may be included in the license fee. Hendrick v. Maryland, supra; Kane v. New Jersey, 242 U. S. 160, 168, 169, 61 L. Ed. 222, 227, 228, 37 Sup. Ct. Rep. 30; Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 Sup. Ct. Rep. 702. But no part of the license fee here in question may be assumed to have prescribed for that purpose. A flat tax substantial in amount and the same for busses plying the streets continually in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as the measure of the cost or value of the use of the highways, and there is no suggestion, either in the language of the ordinance or in the construction put upon it by the Supreme Court of Indiana, that the proceeds of the license fees are, in any part, to be applied to the construction or maintenance of the city streets. Compare Tomlinson v. Indianapolis, 144 Ind. 142, 36 L. R. A. 414, 43 N. E. 9; Terre Haute v. Kersey, 159 Ind. 300, 95 Am. St. Rep. 296, 64 N. E. 469; Hogan v. Indianapolis, 159 Ind. 523, 65 N. E. 525.

It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise tax for the use of the streets of the city."

Sprout v. South Bend, supra.

Apply the principle announced by this Court in the above case to the admitted facts shown in the record in this case.

The record shows that the appellants and all said others similarly interested or situated have paid under subdivision (a) all of the exactions and the defendant is enforcing that subdivision; the defendant will collect more than $6,000,000.00 for the year 1929 from said subdivision (a). The appellants and said others will pay during the year 1929 about $4,000,000.00 under the provisions of subdivision (b) and (c). The entire cost for regulation for that year may not be more than $2,000,000.00. The said $4,000,000.00 will be expended exclusively on Federal Highways for construction, maintenance and repairs, and the money is not expended on the construction, maintenance and repair of the streets of cities. The appellants and said others do not use any highway by their motor vehicles, but use exclusively the streets of said cities by their motor vehicles. The cities are compelled to pay for the construction, maintenance and repairs of their streets and in order to create a fund to aid in said work have passed ordinances in the nature of license fees exacting charges on every motor vehicle using the streets transporting passengers for hire or property. The money collected therefrom is used for the cost of regulation and for construction, maintenance and repairs on said streets. The appellants and said others have and will be compelled to pay said exactions to said cities before they can use their motor vehicles on said streets.

The total amount of the money collected under said subdivisions (b) and (c) will be used for the construction, maintenance and repair of the highways outside of the limits of cities. The said exactions under said subdivisions were not "designed as the measure of the cost or value of the use of the highways."

In the decision we found the following cases cited, to-wit: *Hendricks v. Maryland, Kane v. New Jersey, Tomlinson v. Indianapolis, Terre Haute v. Kersey* and *Hogan v. Indianapolis.*

We have already cited these cases to show that said exactions were tolls and could not be sustained under the police power. We refer our argument and citations found in paragraphs II and III.

The opinion of this Court in the *Sprout* case declared that the exactions therein were not an occupation tax. The exactions under said subdivisions (b) and (c) cannot be sustained as occupation taxes.

Prior to the enactment of the Federal Aid Legislation this Court has held that non-residents must pay reasonable excise taxes in the shape of registration fees before they might use the highways by their motor vehicles. These fees were to cover the cost of regulation and a reasonable charge to cover the cost of the maintenance and repair of said highways made necessary by the wear of such highways by the motor vehicles of said non-residents; that said reasonable exactions were not in violation of the Commerce Clause.

If said exactions of said subdivisions (b) and (c) can be held to be occupation taxes then Hendrick and Kane would have been protected.

The appellants and said others do not carry on any business by their motor or other vehicles on any highways outside of the limits of the cities and pay to said cities vehicle license taxes enacted under ordinances of said cities which are "tolls." As shown by the admitted facts the appellants and said others cause no damage to highways outside said cities as their vehicles do not use such highways; all of the money collected under the provisions of said subdivisions (b) and (c) is spent for the maintenance and repair of highways outside of said cities.

The said subdivisions (b) and (c) are also in violation of the said 14th Amendment. As is admitted, the appellee will collect the said exactions from the appellants and said others before they can use their vehicles on the streets of the cities in transporting passengers for hire or transporting property. No benefit whatsoever is to be derived from the money which is collected as far as said appellants and said others are concerned. Said appellants and said others do receive direct benefits derived from the license fees charged by the said cities. The said provisions of said subdivisions (b) and (c) and the provisions of said city ordinances are alike. Their sole purpose is to obtain money for the purpose of constructing, maintaining and repairing the highways outside of the limits of cities, and for the construction, maintenance and repair of streets in said cities.

Those provisions of both the said subdivisions and the city ordinances are "tolls." (See our Brief Paragraphs II, III and V.) This Court in the Sprout case cited the case of *St. Louis v. Western Union Teleg. Co.,* 148 U. S. 92, 37 L. ed. 380, on the question of an excise tax.

The Telegraph Company attacked an ordinance requiring the company to pay a license fee for every telegraph pole in the streets of St. Louis. This Court held that the charge so made could be obviated by the Company if they would not use the streets, by their poles if they placed their poles on private property.

In delivering the opinion of the Court Mr. Justice Brewer said:

> "The amount to be paid is not graduated by the amount of the business, nor is it a fixed sum for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship.' Philadelphia & R. R. Co. v. Pennsylvania (State Freight Tax Case), 82 U. S. 15 Wall 232, 278, (21:146, 162.) If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it * * * That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section."
>
> *St. Louis v. Western Union Teleg. Co.,* 148 U. S. 92, 37 L. ed. 380.

In the instant case the appellants and said others have never and will not use the public highway outside the limits of cities. Under the principle announced in the above and other cases we are entitled to the protection of the 14th amendment.

This Court had before it a suit involving the distinction between a toll and a tonnage impost. The City of Chicago passed an ordinance requiring tug boats operating in the Chicago River to obtain licenses. The plaintiff below paid the sum of $300.00 for licenses for 12 steam tugs.

The only defense presented to the Court was that such fees were charged and collected as compensation for benefits conferred in providing an improved waterway, and that said payments were made as tolls exacted as a reasonable compensation for such improvements. Your Court cited the following cases, *Huse v. Glover,* 119 U. S. 543 (30:487), and *Sands v. Manistee River Imp. Co.,* 123 U. S. 288 (31:149), in which cases this Court declared that such cases showed that the said license fee was not to be classed as a toll for the reason that the Chicago River, although it had been deepened from time to time, furnished no benefits for the operation of such tugs on such river, and that no such compensation could be assessed as a toll for the use of such artificial improvements. And in the opinion of the Court delivered by Mr. Justice Field, it is said:

> "The attempt is made to assimilate the present case to those cases from the fact that it is conceded that the Chicago River is from time to time deepened for navigation purposes by dredging

> under the direction and at the expense of the city. The license fee provided for in the ordinance of the city is treated as in the nature of a toll or compensation for the expense of deepening the river. But the plain answer to this position is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen nor can arise to the tugs in question by the alleged deepening of the river."
>
> *Harmon v. Chicago,* 147 U. S. 396, 408, 409, 37 L. ed. 216, 221, 222.

As is seen in the instant case the appellant and said others do not receive any benefit, although they will be compelled to pay the tolls provided for under said subdivisions (b) and (c).

The Supreme Court of California has interpreted two acts of the Legislature of California. The said two acts made two classes, one relating to operations of motor vehicles on the highways outside of the limits of the cities, and the other two relating to operations of motor vehicles inside of the limits of the cities.

The first act was passed at the same time in 1923 as the "California Vehicle Act." This act is so called Motor Vehicle Transportation License Tax, being Chap. 341 of the Statutes of 1923.

In the opinion of the Court delivered by Justice Shenk we find the following:

> "As indicated by its title, the act was designed to impose a license tax upon those engaged in the business of operating motor vehicles upon the public highways for the transportation of persons or property for compensation. * * *
>
> "An examination of the entire statute discloses that the obvious and only purpose of the act was

to provide a revenue with which to maintain and repair the public highways of the state outside of incorporated cities, and that such revenue was to be obtained by the imposition of a license or privilege tax on the business of operating motor vehicles for hire over such public highways. The act is not a police measure in any sense. It provides for license tax for revenue purposes only."

Interpreting Section 8, the opinion said:

"The license taxes here imposed by the Legislature are in furtherance of a state purpose for the maintenance of state highways and to extend aid in the maintenance of county highways."

Interpreting Section 9, relating to exemptions of certain classes of vehicles, the following is found in the opinion:

"It is apparent that this exemption and the further exemption * * * were intended to apply to those who are engaged in the business of operating motor vehicles for hire within the limits of incorporated cities. As such, they may be properly so separatedly classified for the reason that highways within the municipality are usually not maintainable directly at the expense of the state but from municipal revenues derived from the exercise of municipal powers of license and taxation, and it must be assumed that the Legislature had this distinction in mind in limiting the license to the use of highways maintainable by the state and for whose maintenance the municipalities are not responsible.

* * * * * * *

We therefore conclude * * * the remainder of the act is a completely enforceable statute as to all operators engaged in the business of using the public highways of the State outside of municipalities for transportation of persons or property for hire."

Bacon Service Corp. v. Huss, 199 Cal. 21, 248 Pac. 235.

The Legislature enacted an amendment of said act being Chap. 412, Stat. of 1925.

The Supreme Court again interpreted said act and the amendment. We set out the following excerpt in the opinion delivered by Justice Shenk:

> "It is thus made plain that it was the intention to exact the license fee from those only who use the public highways outside of incorporated cities in the conduct of their business and that as to those whose business is operating exclusively within such cities the license is not required, this on the theory that the latter are or may be called upon to respond to a license tax or other exaction imposed for like purposes by the municipality itself, and that as to those operating both within and without incorporated cities they should receive a credit in their state license tax for whatever amount they are required to pay as county and municipal licenses and taxes. There would seem to be nothing unfair or unjust in the license plan thus laid out by the statute. We are of the opinion that the exemptions and classifications provided for in section 9, when read in conjunction with the rest of the act, do not amount to arbitrary action or unlawful discrimination on the part of the legislature."
>
> *In re Schmolke,* 199 Cal. 42.

In other words, the appellants and said others have paid the fees to the cities and do not use the highways outside of the limits of the cities.

Said subdivisions (b) and (c), as aforesaid, violate the 14th Amendment.

Moreover, the said subdivision (c), as aforesaid, violates the 14th Amendment.

Section of 77 of the "California Vehicle Act" of 1923 provided:

"For each such vehicle weighing, when unladen, less than 3000 pounds.....$10.00

As is seen, the Legislature had in 1927 struck out any fees if the motor vehicle, trailer and semi-trailer weighed unladen, less than 3000 pounds. There is no limit to any any weight of vehicle and load, if the motor vehicle, trailer and semi-trailer only weigh, unladen, less than 3000 pounds.

The admitted facts show (R. 23, 24, 26, 27) that there are many thousands of such vehicles which are used in transporting passengers for hire or transporting property; that the appellants and said others are in direct competition with the said owners and operators of vehicles which do not pay said exaction under said subdivision (c), even though said vehicles carry more than 6000 pounds. The appellants and said others have been and will be daily irreparably damaged by said vehicles, as they are engaged in the same class of business as the appellants and said others.

The said subdivision (c) violates the 14th Amendment. We cite a few cases showing that subdivisions (b) and (c) or (c) are contrary to and in violation of the 14th Amendment.

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the rights of classification of industries and occupations we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such protection is denied when upon one of the two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon

the other * * *. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

Cotting v. Goddard, 183 U. S. 79, 46 L. Ed. 92, 111.

"The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. Mr. Justice Field, delivering the opinion of this Court in Barbier v. Connolly, 113 U. S. 27, 28 L Ed. 923, 924, 5 Sup. Ct. Rep. 357, of the equality clause said: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment.' In Hayes v. Missouri, 120 U. S. 68, 30 L. Ed. 578, 7 Sup. Ct. Rep. 350, the court speaking thru the same justice, said the 14th Amendment 'does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' Thus, the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however, limited, of a personal property right, is just as clearly a denial of equal protection of the laws of the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254, 42 Sup. Ct. Rep. 124.

"The gross receipts of incorporated operators are taxed while that of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirements that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. Power Mfg. Co. v. Saunders, supra. No decision of this Court gives support to such a classification. In no view can it be held to have more than an arbitrary basis."

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 72 L. Ed. 609.

We submit that said subdivisions, as aforesaid, are unconstitutional; and the appellants and said others are entitled to the protection of the 14th Amendment prohibiting the making or enforcement of any law which shall abridge the privileges or immunities of citizens, or which shall deprive any person of life, liberty, or property without due process of law, or denies to any person the equal protection of the laws.

VI.

The Said Provisions of Said Subdivisions (b) and (c) of Said Section 77 of the "California Vehicle Act" are Contrary to and in Violation of the Constitution of California.

We refer to our argument and citations in pars. II, III, IV and V in our brief, showing that the provisions of said subdivisions (b) and (c), as aforesaid, are unconstitutional.

In addition we cite the following provision of the state constitution, being Article I, Section 21:

> "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the Legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

Said exactions under said subdivisions (b) and (c) are "tolls." The appellants and said others are compelled to pay "tolls" on highways which they never use, while others receive the benefits of said money collected from the appellants and said others.

The said exactions are "taxes" imposed by the provisions of Section 12 of Article XI, supra.

People v. Martin, 60 Cal. 153.

Such use of the streets of a city by delivery wagons of a business enterprise, as would be merely occasional and incidental to a business conducted elsewhere than within its boundaries, would not be the proper subject of taxation by such city and the license law offends Section 12 of Article XI.

The Emporium v. San Mateo, 177 Cal. 624.

To the same effect:

In re Hart, 36 Cal. App. 627;
Matter of Hines, 33 Cal. App. 45;
Matter of Application Smith, 33 Cal. App. 161;
Town of St. Helena v. Butterworth, 198 Cal. 230.

The said provisions of subdivision (c) are unconstitutional.

When the Legislature amended Section 77 in 1927 by eliminating the provision requiring all motor vehicles, trailers and semi-trailers weighing, unladen, less than 3000 pounds, to pay the exaction, namely, $10.00, as provided for under subdivision (c), it violated said Section 12 of Article XI, as there are many thousands of vehicles which have been granted said privileges and immunities. We have previously shown what the admitted facts are in our brief.

The whole of said subdivision (c) must be held unconstitutional, as there is no provision in said subdivision which can force the owners or operators to pay any exaction if their vehicles are less than 3000 pounds in weight, unladen.

> "In Hellman v. Shoulters the court says: "It has been uniformly held that a law is general which applies to all of a class—the classification being a proper one—and that the requirement of uniformity is satisfied, if it applies to all of the class alike. The word 'uniform' in the constitution does not mean 'universal.' The section intends simply that the effect of general laws shall be the same to and upon all persons who stand in the same relation to the law—that is, all the facts of whose cases are substantially the same." The classification, however, is not a

proper one for distinct legislation, if it is not founded upon some natural, intrinsic, or constitutional distinction, a distinction which bears some relation to, or furnishes cause for, the particular legislation embraced in the act. (Pasadena v. Stinson, 91 Cal. 251, (27 Pac. 604); Darcy v. Mayor, 104 Cal. 645, (38 Pac. 500); Bruch v. Comombet, 104 Cal. 351, (38 Pac. 45); Rauer v. Williams, 118 Cal. 401, (50 Pac. 6911); Budd v. Hancock, 66 N. J. L. 135, (48 Atl. 1023); 26 Am. & Eng. Ency. of Law, 2d ed., 683.) Upon this subject the Supreme Court of the United States has said that the State, 'in prescribing regulations for the conduct of trade, cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class, engaged in the same domestic trade, to do the same things with impunity,' and that it cannot discriminate 'by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exercise of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom discriminates.' (Connolly v. Union Sewer Pipe Co., 184 U. S. 563, (22 Sup. Ct. 440.) This was said with respect to a law prohibiting combinations between persons engaged in trade, but exempting from its provisions farmers and stockraisers."

Ex Parte Sohncke, 148 Cal. 262, 267.

"The interest of the petitioners in this proceeding consists in the fact that they are themselves engaged in the business of transportation of property as common carriers for compensation operating over the same routes which are followed by the truck operators referred to in the petition. Petitioners are operating under certificates

of public convenience and necessity obtained from the Railroad Commission, are subject to all of the regulations of the Commission, and by reason of the failure of the Commission to act in the premises petitioners are subject to the unrestricted and unregulated competition of those other truck operators. Petitioners contend that the amendment of 1923 is violative of sections 11 and 21 of Article I of the Constitution of this State and of the fourteenth amendment to the Federal Constitution, in that it makes an arbitrary classification and distinction not based upon any natural, intrinsic or constitutional ground of classification. In short, their contention is that the amendment which purports to exempt from the regulations of the act those transportation companies which are engaged in hauling the products and implements of husbandry constitutes an unreasonable, unjust and unlawful discrimination in favor of those transportation companies and against these petitioners * * *. The question, therefore, is whether or not the exemption created by the proviso of 1923 constitutes a lawful classification. Concededly the classification here made does not rest upon a constitutional distinction, and some natural or intrinsic distinction must therefore be found as a basis for it. * * * It is equally well settled that a statute makes an improper and unlawful discrimination if it confers particular privileges upon a class arbitrarily selected from a large number of persons all of whom stand in the same relation to the privileges granted and between whom and the persons not so favored no reasonable distinction or substantial difference can be found justifying the inclusion of the one and the exclusion of the other (5 Cal. Jur. 825, and cases cited). What reasonable ground of distinction is there between a common carrier engaged in the business of hauling various kinds of freight, including products and implements of husbandry, by motor truck over a regular route upon the public highway and another

common carrier engaged in the business of hauling freight which consists solely of the products and implements of husbandry by motor truck over the same route, which justifies the subjection of the one to the regulations imposed by the Auto Stage and Truck Transportation Act, and the exemption of the other from the burden of those regulations? * * * Assuming, however, that the provision in question was designed for the benefit of the farmers and that it may conceivably so operate, the weight of authority is to the effect that it is an unwarranted discrimination. A closely similar question came before the Supreme Court of the United States involving the validity of the Illinois Anti-Trust Law of 1893 (Ill. Laws 1893, p. 182), which prohibited a combination of capital, skill, or acts, of two or more persons, etc., to create or carry out restrictions in trade, to limit production or increase or reduce prices or prevent competition, and which contained a proviso that 'The provisions of this act shall not apply to agricultural products or livestock while in the hands of the producer or raiser.' That court, after an exhaustive consideration of the case, held the statute invalid solely upon the ground that the exception in favor of the farmers was an unreasonable and unwarranted discrimination, violative of the fourteenth amendment. In the course of its opinion the court observed, 'that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may for their benefit exclusively control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful.' (Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (46 L. Ed. 679, 22 Sup. Ct. Rep. 431, see, also Rose's U. S. Notes.) * * *. We do not mean to infer that every classification based upon a distinction between farmers on the

one hand and all other persons on the other is unconstitutional, but we are impelled to conclude that no natural, intrinsic or constitutional distinction is to be found as a basis for the exemption of the transportation companies described in the 1923 amendment, supra, from the regulations prescribed in the Auto Stage and Truck Transportation Act, and that such attempted exemption is violative of the fourteenth amendment to the federal constitution and of like provisions in our state constitution. It is not claimed, and in view of the legislative history of the act could not be claimed, that the provisions of this exception are so intimately and inherently related to and connected with the general provisions to which it relates as to invalidate the latter."

Franchise Motor Freight Assn. v. Seavey, 196 Cal. 77, 80, 81, 82, 85.

The exemption in the Act of 1923 (Stats. 1923, p. 706) of sight-seeing motor busses carrying passengers for hire and operating outside of municipalities and the exemption of the entire revenues of operators a part but not all of whose business embraces the carriage of the United States mail and parcels post by contract, are not based on any properly recognizable theory of classification; and such exemptions attempt to confer special privileges and immunities upon operators of such sight-seeing busses and mail and parcels post contract carriers in violation of Section 21 of Article I of the Constitution, and are therefore void.

Bacon Service Corporation v. Huss, supra.

The above citation shows conclusively that said subdivision (c) is unconstitutional, and the appellants and said others are entitled to the protection of

the said Section 21 of Article XI of the State Constitution.

We cite a late decision of this Court which shows that the Federal Courts will construe the said State Constitution.

> "Its jurisdiction thus established gave the district court the authority to determine all questions involved, including questions of state law, irrespective of the disposition of the Federal question; and as the relief to which the complainant might be entitled would be the same as that which should be allowed him by the Federal Court upon a construction of the State Constitution and laws such as he contends for, the question whether the acts complained of violated the Federal Constitution need not be decided." (Citations.) "It follows therefore, that in both the cases under consideration, the district court has jurisdiction to consider and decide whether the complainants in those cases are so injured by a violation of the State Constitution and laws in the taxation of their property as to entitle them to the equitable remedy of injunction against the taxing officials made defendants."
>
> *Chicago Great Western R. Co. v. Kendall*, 266 U. S. 96, 97; 69 L. Ed. 188, 189.

VII.

THE LOWER COURT ERRED IN DENYING THE APPLICATION TO FILE AND PRESENT THE AMENDED BILL OF COMPLAINT AFTER IT HAD FILED ITS WRITTEN OPINION.

As is shown, immediately after the lower Court had filed its decision, the appellants immediately filed a motion accompanied by a proposed amended bill of

complaint, so as to show more in detail and to obviate the decision that was based upon police power.

We followed equity rule 19. The lower Court did not pass directly upon whether or not said amended bill of complaint should be filed and presented, but entered an order refusing to set aside the order and decree.

We included in the transcript of the record certain paragraphs of the said proposed amended bill of complaint. This Court has before it the matters contained in said proposed bill and this Court can examine said matters in connection with the averments of the original bill of complaint.

We consider that this Court has the power to base any decision it may reach upon the entire record, as it would be idle to reverse the decree and order by reason of the failure of the lower Court to take jurisdiction over said proposed bill of complaint.

VIII.

THE ACTIONS OF THE APPELLEE IN ENFORCING SAID UNCONSTITUTIONAL AND VOID SUBDIVISIONS (B) AND (C) OF SECTION 77 OF THE "CALIFORNIA VEHICLE ACT," AS AMENDED, ARE ILLEGAL, BEING CONTRARY TO AND IN VIOLATION OF THE 14TH AMENDMENT, AND ALSO THE CONSTITUTION OF CALIFORNIA.

Under this paragraph we call attention to the Court of our argument and citations showing that said subdivisions (b) and (c), as aforesaid, are unconstitutional. Therefore, said appellee is illegally acting in collecting said exactions from the plaintiffs and all

persons, firms, associations, and corporations similarly interested or situated.

IX.

THE APPELLANTS ON BEHALF OF THEMSELVES AND FOR ALL OTHERS SIMILARLY INTERESTED OR SITUATED ASK FOR RELIEF BY INJUNCTION ENJOINING AND RESTRAINING SAID APPELLEE FROM ENFORCING SAID SUBDIVISIONS (B) AND (C), AS AFORESAID.

The admitted facts show that said appellee has continued to enforce said subdivisions after the lower Court had dissolved the said preliminary injunction, and he will continue to so act against said appellants and said others to their irreparable damage and loss. Every day said appellants and all said others are being irreparably damaged by the said competition by owners and operators who have not been and will not be compelled to pay said exactions under said subdivisions.

We therefore submit that said appellants and said others should be protected by proper order.

X.

THE SAID ORDER AND DECREE OF THE LOWER COURT SHOULD BE REVERSED BY THIS HONORABLE COURT.

We submit that this Honorable Court should reverse the said order dissolving the said preliminary injunction and granting the motion to dismiss, and also the decree of said lower Court.

We pray this Honorable Court direct the lower Court a final decree declaring the said subdivisions (b) and (c) of said section of said "California Vehicle Act," being Chap. 266, Stats. of 1923, as amended by Chap. 844, Stats. of 1927, are unconstitutional and the said appellee, Frank G. Snook, as Chief of the Division of Motor Vehicles, be forever enjoined and permanently restrained from enforcing the said unconstitutional subdivisions (b) and (c); and further, this Honorable Court shall direct the said lower Court to command the said appellee to account all of the moneys collected by him under the said subdivisions (b) and (c) and pay the sum so found into the registry of said Court; and further to permit any allowances, distributions and payments as may be thereafter determined, awarded and decreed; and further, this Honorable Court shall issue any order or orders it may deem proper and fit in the premises or for any other or proper relief.

Dated, San Francisco,
September 21, 1929.

Respectfully submitted,
W. R. CRAWFORD,
J. F. VIZZARD,
EDWIN C. EWING,
Solicitors for Appellants.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1929

No. 86

CARLEY & HAMILTON, INC., et al.,
Appellants,

vs.

FRANK G. SNOOK, As Chief of the Division of Motor Vehicles,
Appellee.

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

PRELIMINARY STATEMENT

This is an action in equity brought by appellants to enjoin the appellee, as Chief of the Division of Motor Vehicles of the State of California, from exacting those motor vehicle registration fees specified in subdivisions (*b*) and (*c*) of section 77 of the California Vehicle Act.

It is contended by appellants that such fees constitute "tolls" for the use of the highways of the state, including federal aid highways and post roads, that the exaction of tolls for the use of federal aid

highways and post roads is in derogation of the federal highway act and the post road act, and that consequently the provisions of the California Vehicle Act, requiring the exaction of such fees, are void.

It is further contended by appellants that such fees are exacted as compensation for the use of state and county highways as distinguished from city streets, that they do not operate their vehicles upon such highways, but operate them upon city streets exclusively, and that consequently the exaction of such fees as to them violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Two other contentions are made which will be noted later.

Sections 21, 36, 49, 77, 78, 79, 159, 160, 161 and 163 of the California Vehicle Act are set forth in the Appendix to this brief.

I

The Registration Fees Provided for by Subdivisions (b) and (c) of Section 77 of the California Vehicle Act Are Not Tolls.

The word *toll* when used with reference to roads, canals, bridges and the like is usually defined as "a charge exacted for the use of a common passage." There are other definitions of similar import, and each is sufficient for general purposes; but there is no definition of the word which we have found which

is explicit enough to serve as a basis for distinguishing a toll from a tax.

It is true that a toll is a charge exacted for the use of a common passage, but it is not true that all charges exacted as conditions precedent to the use of common passage are tolls.

In the first place, a toll is a charge exacted by the proprietor as compensation for the use of property: it is a demand of proprietorship, whereas a tax is a demand of sovereignty.

Augusta vs. *Augusta & A. Ry. Co.,* 130 Ga. 815; 61 S. E. 992, 993; 124 Am. St. Rep. 197.
St. Louis vs. *Western Union Tel. Co.,* 148 U. S. 92.

A toll as compensation for the use of property includes within it a reimbursement for the cost of maintaining the property for use, and also a payment, by way of rent or profit, to the proprietor for permitting his property to be used.

This incident of a toll was recognized by Congress in enacting Section 9-a of Title 23 of the U. S. Code. Such title is the Federal Highway Act as codified. Section 9, the provision relied upon by appellants, reads:

> "All highways constructed or reconstructed under the provisions of this chapter shall be free from tolls of all kinds."

And section 9-a provides:

> "Notwithstanding any provision of this title,

the Secretary of Agriculture may extend, on the same basis and in the same manner as in the construction of any free bridge, federal aid under such title, in the construction of any toll bridge and approaches thereto, by any state or states, or political subdivision or subdivisions thereof, upon the condition that such bridge is owned and operated by such state or states, or political subdivision or subdivisions thereof, and that all tolls received from the operation thereof, less the actual cost of operation and maintenance, are applied to the repayment to the state or states, or political subdivision or subdivisions thereof, of its or their part of the cost of construction of such bridge, and upon the further condition that when the amount contributed by such state or states, or political subdivision or subdivisions thereof, in the construction of such bridge shall have been repaid from the tolls, the collection of tolls for the use of such bridge shall thereafter cease, and the same shall be maintained and operated as a free bridge."

Under such provision it is out of the rents and profits of the tolls (*i. e.,* those portions of the tolls which are in excess of the amounts necessary to maintain and operate the bridge) that the state or political subdivision reimburses itself for its cost of constructing the bridge. Ordinarily, such rents and profits go, and continue to go, to the proprietor for his own use. In this instance they go to the proprietor until it has reinmbursed itself for its expenditure, and then all tolls cease.

The two concluding clauses of the provision are of particular significance, namely: the clauses:

> "—the collection of tolls for the use of such bridge shall thereafter cease, and the same shall be maintained and operated as a *free* bridge."

The use of the word *free* in this connection is indicative of the meaning Congress attached to the word *toll*. It was never contemplated by Congress that the state should not be privileged to raise the revenue necessary to operate and maintain the bridge. What Congress sought to prohibit was the charging of a special, or direct, fee for the use of the bridge as distinguished from a general, or indirect, levy.

As we have already shown, a toll is a demand of proprietorship, where as a tax is a demand of sovereignty. A tax is imposed not as compensation for the use of property, but for the general good.

Let us pause for a moment and apply this distinction between a toll and a tax to the facts before us. The registration fees provided for by subdivisions (*b*) and (*c*) of section 77 of the California Vehicle Act are exacted as conditions precedent to the use of motor vehicles, trailers and semitrailers (falling within the classes specified in such subdivisions) upon public highways, and a public highway is defined by section 21 of the Act as:

> "Every highway, road, street, alley, lane, court, place, trail, drive, bridge, viaduct or trestle laid out or erected as such by the public or dedicated or abandoned to the public or intended or used by

or for the general public, except such portions thereof as are used or prepared for use by pedestrians as sidewalks. The term 'public highway' shall apply to and include driveways upon the grounds of universities, colleges, schools and institutions. The term 'public highway' shall not be deemed to include private driveways, roads or places used by the owner, his guests and those having business with the owner and not intended to be otherwise used, or otherwise used by the general public."

Appellants make a particular point of the fact that many of the ways covered by such definition were neither acquired nor improved at state expense, and are not maintained at state expense. Indeed, they contend that all the streets within incorporated cities fall within such category. Following such contention they say that of consequence the state has no proprietary right over such ways or streets, and is not entitled to exact compensation for their use. Assuming the matter of expense to be the determining factor of proprietorship then it follows that the registration fees provided for in such subdivisions of the California Vehicle Act do not fall within the classification of a toll in that they are not exacted as reimbursement for money expended, or as rent or profit for the use of property over which the state has the right of proprietorship. Conversely, such fees fall within the classification of impositions for the common good, for it goes without saying that the

enforcement of the regulations of a state law (*i. e.*, the California Vehicle Act) and the construction, reconstruction and maintenance of state and county highways is for the common good.

In this particular at least, the fees provided for in subdivisions (*b*) and (*c*) of section 77 of the California Vehicle Act are characteristic of taxes as distinguished from tolls.

Another distinction is to be made between a tax and a toll, and that is, that a toll is usually exacted at the point of use, whereas a tax is usually exacted at the seat of government. There is an early case upon this point, that of

> *State ex rel. Lacoste* vs. *Vigneaux,* 130 La. 424; 58 So. 135, 137.

It involved the imposition of license fees on buggies and other means of conveyance, the amount collected to be applied to the maintenance and repair of public roads. The court said:

> "Something has been said about a 'toll.' That has no application. That is something imposed at the locality where a passageway is used for special benefit received. The use of a public road is not considered in that light."

Of course, it does not follow that a toll could not be devised which would be exacted at the seat of government rather than at the point of use. For example, should a legislature require the payment of a special registration fee as a condition to the use of

a certain highway, such a registration fee would be *in the nature of* a toll, or of an extra or special charge, for the use of *that* highway, as distinguished from other highways. But that situation is not presented here; in this case all public highways are treated alike, and one pays no more nor no less for using one than for using all.

Another usual, if not invariable, characteristic of a toll is that the amount of the charge is in proportion to the amount of use to which property is put, whereas a usual, though not invariable, characteristic of a tax, and particularly of a license tax, is that its amount is determined by a time, rather than by a use, factor. For example: The toll for the use of a toll road, toll canal or toll bridge is usually charged each time the road, canal or bridge is used, and is graduated according to the weight, or the number of passengers, actually transported, whereas the amount of a tax is usually computed upon an annual, monthly or daily basis, although the amount or nature of use, or potential use, may be taken into consideration.

In the case before us there is no attempt to fix the charge according to the actual use which is made of the highways. The registration fees provided for are exacted on an annual basis, and within the year covered by the fees the vehicle owner is licensed to use it on the highways for as many passenger or ton-miles as he sees fit, as long as he does not exceed the lawful speed limits, or load the vehicle so as to ex-

ceed the weight per area of tire surface in contact with the road restrictions.

It is true that in addition to the time factor the nature and extent of potential use, as distinguished from actual use, is taken into consideration, and the fees apportioned accordingly. But that is true of many forms of license taxes, of which the theater license tax, graduated according to the seating capacity of the theater, and the barber shop license tax, graduated according to the number of chairs, are common examples. In those cases, as in this, it is the extent of potential use, rather than the extent of actual use, which forms the basis of graduation. Such is not a customary method of determining the amounts of toll to be charged.

There is still another characteristic of a toll, or rather of a toll road, which deserves consideration. It is that a toll road is usually but a link in a highway system, a link having both a beginning and an end, and which differs from the roads with which it connects in that a special charge is made to traverse it, whereas the roads with which it connects are traversed without payment of special fees.

In a sense this is a repetition of what we have already said, but it serves to illustrate the distinction between a free and a toll road, a distinction recognized by jurists and lay persons alike, a distinction recognized by Congress in the Federal Highway Act itself.

See U. S. C. Title 23, Section 9a, *supra*.

So far we have dealt with the general characteristics of a toll as distinguished from a tax, and have cited no authority involving the construction of the word *toll* as used in the Federal Highway Act. Let us turn to the cases dealing with such subject.

In the case of *Smallwood* vs. *Jeter,* 244 Pac. 149, 156, the Supreme Court of Idaho said:

> "The five per cent tax levied by the act is not a 'toll'. Its levy is not in violation of 'the acts of November 9, 1921 (1921 supp. fed. st. ann. 95, (U. S. Comp. Stat. Ann. Supp. 1923, secs. 7477¼–7477¼y) and of July 11, 1916 (1918 supp. fed. stat. ann. 639) (U. S. Comp. Stat. Sec. 7477a *et seq.*)), forbidding tolls on federal aid roads.' It is a license tax laid not upon the vehicle, but upon the privilege of using the highways for business purposes."

In the case of *Cunningham* vs. *Potts,* 9 F. (2d) 469, 471, the court said:

> "If a tax of two cents a gallon paid by the seller or distributor of gasoline used in vehicles operated or intended to be operated upon the public highways of the state, is in any sense a toll charged for the use of such public highways, it is not forbidden by section 9, because there are public highways of the state for the privilege of using which, by motor vehicles, the state has the undoubted right to exact such tax. If an attempt were made to collect such a tax upon gas distributed and used in motor vehicles operated and intended to be operated exclusively upon federal

aid highways, a different question would be presented."

The appeal of that case to this court was dismissed by this court. (47 S. Ct. 334.)

It should be observed that a gasoline tax is in one respect at least more in the nature of a toll than are the registration fees now under consideration, for the amount of gasoline consumed by a motor vehicle bears a direct relationship to the number of ton-miles traversed by the vehicle, and so the amount of tax collected would bear a direct relationship to the use made of the highways.

In the case of *Liberty Highway Co.* vs. *Michigan Public Utilities Commission,* 294 Fed. 703, 708, the court was considering a statute which imposed an annual license fee of one dollar for each one hundred pounds of weight of each motor vehicle used as a common carrier over the highways of the state, and provided that such license fees should be in addition to the motor vehicle tax prescribed by general law. The court said:

"Section 9 of the Federal Highway Act of November 9, 1921 * * * provides:

'All highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds.'

This is not in our judgment intended to refer to license fees such as are here involved (it not being even claimed that such act has reference to the analogous fees imposed under general motor vehicle license laws or to laws licensing drivers

of such vehicles). *State* vs. *Vigneaux,* 130 La. 424; 58 So. 135. The most that can be said of it in this connection is that such a provision is merely a condition attached as between the federal government and the state to the contribution of aid provided by federal legislation, and can not deprive the state of its power and duty as trustee of the public highways for the benefit of the people of the state to enact reasonable regulations in the exercise of its police power over such highways."

In the case of *Sanger* vs. *Lukens,* 24 F. (2d) 226, 229, the court was considering a statute of the state of Idaho requiring persons engaged in the automobile transportation business to do certain things, including the payment of certain fees in amounts rated according to the capacities of the vehicles used, the fees so collected to be used for the maintenance of state highways. The court said:

"It is further claimed and strenuously insisted upon by the plaintiff that the act of Congress, relating to the appropriation of funds for the construction of highways and generally known as 'government aid,' wherein it is provided that highways shall be free from 'tolls,' withholds from the state the power to prescribe regulations for their use. This question has been decided adversely to plaintiff's contention by both the Supreme Court of the state and of the United States. In referring to the state law, the Supreme Court of the state held that 'the 5 per cent tax levied by the act is not a 'toll.' Its levy

is not in violation of 'the Acts of November 9, 1921 (1921 Supp. Fed. Stats. Ann. 95 (23 USCA sec 1 *et seq.*)), and of July 11, 1916 (1918 Supp. Fed. Stats. Ann. 639 (Comp. St. secs. 7477a-7477i, 5150a)), forbidding tolls on federal aid roads.' It is a license tax, laid not upon the vehicle, but upon the privilege of using the highways for business purposes.' *Smallwood* vs. *Jeter, supra.* In the case of *Morris et al.* vs. *Duby et al.,* 274 U. S. 135, 47 S. Ct. 548, 71 L. Ed. 966, recently decided by the Supreme Court of the United States, it was held that a regulation relative to a license fee of motor vehicles, imposed by the state statute for the use of the highways for hire, has no relation to the tolls inhibited by the act of Congress. The court said:

'An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens. *Hendrick* vs. *Maryland,* 235 U. S. 610, 622, 35 S. Ct. 140, 59 L. Ed. 385, *et seq.*; *Kane* vs. *New Jersey,* 242 U. S. 160, 167, 37 S. Ct. 30, 61 L. Ed. 222.' *Martine et al.* vs. *Kozer,* (D.

C.) 11 F. (2d) 645; *Anthony et al.* vs. *Kozer* (D. C.) 11 F. (2d) 641.

Thus we see that the license fee or privilege tax imposed by the statute is not a 'toll' of any kind within the meaning of the act of Congress, and therefore the state legislation is not void."

Next, we would call the court's attention to the cases of *Anthony* vs. *Kozer* and *Martine* vs. *Kozer,* both in 11 F. (2d), the former at page 641, and the latter at page 645. In the former case the court had under consideration a gasoline tax of the state of Oregon. The court said:

"Further than this the tax lacks the characteristics of a toll. In its general acceptation toll is 'a settled, certain and defined sum exacted for the use of a common passage; a tribute or custom paid for passage, or a duty imposed on goods and passengers traveling public roads, bridges, etc.; a tribute for passage; * * * a tax paid for some use or privilege or other reasonable consideration; a consideration for the use of a road or bridge, not compensation for carriage over it; a tribute or custom paid for passage; something taken for a liberty or privilege.' 38 Cyc. 359.

No doubt the Congress had in mind, in adopting the clause, 'all highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds,' the many toll roads of the country that were in years previous constructed through grants of public lands and bounties appropriated by the general government, and on which, for the privilege of passage,

the proprietors were permitted to exact tolls, and it was adopted as a policy that no tolls of any kind should be exacted for the privilege of passage over the rural post roads for the construction of which the government was to appropriate its public funds. Such is obviously the intendment of the acts of Congress in extending aid to the states for construction and maintenance of their roads and highways. The excise tax here provided for has no relation to the tolls inhibited by the acts of Congress, and is therefore not to be condemned as such."

In the latter case, that of *Martine* vs. *Kozer, supra,* the court had before it for consideration a statute of the state of Oregon directly corresponding to the California Vehicle Act. Under section 21 of that statute license fees, graduated from three dollars to ninety-seven dollars per vehicle according to the style and weight of the car, were required to be paid by the owner, and the license fees on motor trucks, trailers and semitrailers were graduated upon a different basis, and, in some instances, were higher than on the machines classed as motor vehicles. It was contended that such license fees amounted to tolls for the use of highways including federal aid highways and post roads, and that section 25 of the statute and the license fees therein provided for were void as being in contravention of the acts of Congress. The court held that such fees were not tolls within the meaning of that word as used in the acts of Congress, and dismissed the suit. Such case is so

directly in point, and its language is so clear and persuasive, that we are setting it forth in full in the appendix of this brief.

In the case of *Kane* vs. *New Jersey,* 242 U. S. 160, 168, this court had under consideration a state law requiring the registration of motor vehicles and the payment of fees of $3, $5 or $10, depending upon the horsepower of the vehicle. It was contended that such provisions violated the commerce provisions of the federal constitution and also the fourteenth amendment to that constitution. The question as to whether such fees constituted tolls as disinguished from taxes was not involved, but this court, after stating that a state had the right to impose such fees as compensation for the use of the facilities afforded, said:

> "The amount of the fee is not so large as to be unreasonable; and it is clearly within the discretion of the state to determine whether the compensation for the use of its highways by automobiles shall be determined by way of a fee, payable annually or semiannually, or by a toll based on mileage or otherwise."

Thus we see that this court has recognized that fees such as are provided for in subdivisions (*b*) and (*c*) of section 77 of the California Vehicle Act are not tolls.

In the earlier case of *Hendrick* vs. *Maryland,* 235 U. S. 610, 622, this court, in passing upon the registration and fee provisions of a state vehicle law, said:

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the state of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction, the state put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious.

In the absence of national legislation covering the subject a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horsepower of the engines—a practical measure of size, speed, and difficulty of control. *This is but an exercise of the police power uni-*

formly recognized as belonging to the states and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce."

(Italics ours. The portion italicized is of significance in view of the contention of appellants that the fees here involved are not exacted under the police power.)

Further on this court said:

"The prescribed regulations upon their face do not appear to be either unnecessary or unreasonable.

In view of the many decisions of this court there can be no serious doubt that where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. *The amount of the charges and the method of collection are primarily for determination by the state itself*; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce. *Transportation Co.* vs. *Parkersburg,* 107 U. S. 691, 699; *Huse* vs. *Glover,* 119 U. S. 543, 548, 549; *Monongahela Navigation Co.* vs. *United States,* 148 U. S. 312, 329, 330; *Minnesota Rate Cases,* 230 U. S. 352, 405; and authorities cited. The action of the state must be treated as correct unless the contrary is made to appear. In the instant case there is no evidence concerning the value of the facili-

ties supplied by the state, the cost of maintaining them, or the fairness of the methods adopted for collecting the charges imposed; and we can not say from a mere inspection of the statute that its provisions are arbitrary or unreasonable." (Italics ours.)

In this case, as in the case of *Kane* vs. *Maryland,* there is no evidence concerning the value of the facilities supplied by the state or the cost of maintaining them. In the next division of this brief we will deal with the fairness of the methods adopted for collecting the charges imposed.

Before closing our discussion of this point, we wish to call the court's attention to the fact that appellants on page 28 of their brief say:

"In the *Hendrick* case, as well as in the *Kane* case, the plaintiffs demanded protection under the commerce clause, and this court held that the commerce clause would not protect them as the exactions were 'tolls.'"

Such statement is unsupported by either case.

II

Subdivisions (b) and (c) of Section 77 of the California Vehicle Act Do Not Offend the Due Process Clause, the Equal Protection Clause, or Any Other Clause of the Fourteenth Amendment to the Constitution of the United States.

It will be observed that, with the exception of the exemptions specified in sections 78 and 79 of the Cali-

fornia Vehicle Act (see Appendix), the provisions of subdivisions (*b*) and (*c*) of section 77 thereof operate alike on all persons from one end of the state to the other. Appellants do not contend that the exemptions mentioned constitute discrimination. What they do contend is that subdivisions (*b*) and (*c*) of section 77 do not afford them the equal protection of the law, and deprive them of property without due process of law, because they are not placed in a special category, and granted special exemptions. They contend that such subdivisions of such section are unconstitutional because all persons *are* treated alike, instead of being grouped into classes, and given different treatment.

The State of California requires that, as a condition precedent to its use upon the public highways of the state, each motor vehicle, trailer and semi-trailer be registered, and that as a condition precedent to such registration certain fees, graduated according to the weight, type and use of such vehicle, be paid to the state. When such fees are paid, a license is issued which permits the vehicle to be operated *over any and every public highway in the state for the period of one year.*

The appellants own and operate a number of motor vehicles. *They* do not wish to operate them over all of the public highways within the state, but only over those public highways located within a particular area. For *that* reason they do not think that they should be required to pay the same registration

fees for the registration of their vehicles as other persons are required to pay for the registration of vehicles operated, or intended to be operated, over a greater area. Indeed, appellants contend that because the statute does not issue restricted (instead of general) licenses for their vehicles, and requires them to pay the uniform fees for the registration of their vehicles, that the statute denies them the equal protection of the law, and deprives them of property (the fees) without due process of law.

If such contention were sound then it would be incumbent upon the state to grant not one or two, but innumerable forms of license, each drafted so as to permit the vehicle for which it is issued to traverse those highways, and only those highways, *which its owner wishes it to traverse, and to fix a special fee in accordance with such wishes of the vehicle's owner.*

It goes without saying that the state is not required to pursue such a course. To pursue it would be the height of folly for even an earnest attempt to enforce the restrictions of the various licenses would require expenditures far in excess of the amount the state now receives for the issuance of general licenses, and a complete enforcement would be impossible without establishing checking stations at frequent intervals over all the highways of the state and stopping each vehicle at each station for an inspection of its license. Such a procedure would place a heavy burden upon travel and upon commerce,

and would be a reversion to the conditions which existed three or four hundred years ago.

The fact that the statute takes no account of the actual use which is made of the highways is of no moment. A somewhat similar point was raised in the case of *Kane* vs. *New Jersey, supra,* and this court disposed of it in the following language:

> "The Maryland law contained a reciprocal provision by which nonresidents whose cars are duly registered in their home state are given, for a limited period, free use of the highways in return for similar privileges granted to residents of Maryland. Such a provision promotes the convenience of owners and prevents the relative hardship of having to pay the full registration fee for a brief use of the highways. It has become common in state legislation; and New Jersey has embodied it in her law since the trial of this case in the lower court. But it is not an essential of valid regulation. Absence of it does not involve discrimination against nonresidents; for any resident similarly situated would be subjected to the same imposition. A resident desiring to use the highways only a single day would also have to pay the full annual fee."

Appellants assert that the question as to whether the state has the right to exact license fees from them as a condition precedent to their use of the streets of an incorporated city is determined by whether or not the state has incurred an expense in the acquisition or maintenance of such streets.

The case of *Sprout* vs. *South Bend,* 277 U. S., 163, cited by appellants, and being the main authority relied upon by them in support of their contention that the fees involved in this case offend the Fourteenth Amendment, does not support that contention, but, properly considered, is an authority in our favor.

On page 169 of that decision this court said:

> "It is true that, in the absence of federal legislation covering the subject, the state may impose, even upon vehicles using the highways exclusively in interstate commerce, nondiscriminatory regulations for the purpose of insuring the public safety and convenience; that licensing or registration of busses is a measure appropriate to that end; and that a license fee no larger in amount than is reasonably required to defray the expense of administering the regulations may be demanded."

And on the following page this court said:

> "It is true, also, that a state may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways."

Such are the two purposes for which the state exacts the fees specified in subdivisions (*b*) and (*c*) of section 77 of the California Vehicle Act. Those, with other fees and charges, are first used to defray the costs of administering the regulations contained in the California Vehicle Act, and the balance is

divided into two equal parts, one of which is expended by the state in the construction and maintenance of state highways, and the other is distributed among the several counties of the state to be used by them for the construction and maintenance of county highways subject to the following provision:

> " * * * the board of supervisors of any county may in its discretion expend any portion of such sums so received by such county in the construction, maintenance and repair of streets, bridges and culverts within those incorporated cities wherein the legislative bodies of which by ordinance authorize such work and construction, maintenance and repair."
>
> California Vehicle Act, Sec. 159, Sub. (*c*).

In the absence of a showing to the contrary it is not to be inferred that the counties in which appellants operate their vehicles have not exercised the authority conferred upon them by the foregoing provision, nor can it be inferred that they will not exercise that authority in the future. Indeed, one of the affidavits filed upon appellants' behalf in the court below, being the affidavit of one of appellants' attorneys, contains the following statement:

> " * * * that under the provisions of clauses of section 159 of said act such counties may and do spend considerable amounts of monies for the construction of highways within the confines of incorporated cities, the amount of which expenditures is at the present time unknown to affiant."
>
> Record, p. 9, ff. 11 and 12.

Again: Subdivision (*a*) of section 160 of the California Vehicle Act provides:

> "All fines or forfeitures collected upon conviction or upon the forfeiture of bail of any person charged with a violation of any of the provisions of this act constituting a misdemeanor following an arrest of such person by an officer employed by a city, shall be paid into the city treasury and deposited in a special fund to be known as the 'street improvement fund' which is hereby created and which shall be used exclusively in the construction, maintenance and improvement of public streets, bridges and culverts within such city. Failure, refusal or neglect to comply with any of the provisions of this section shall constitute misconduct in office and shall be ground for removal therefrom."

The legislature, in enacting the California Vehicle Act, might well have provided that fines collected under subdivision (*a*) of section 160 should be deposited in the motor vehicle fund together with the other fees and charges imposed by that act. Had the legislature done so, and then provided that a portion of the motor vehicle fund should be distributed among the incorporated cities of the state, there would be no question but that the fees of which appellants complain were used in part for the construction and maintenance of city streets. Instead of so providing, the legislature turned over to the several cities—for them to employ in the construction, maintenance and improvement of their streets,

bridges and culverts within such cities—a specific source of revenue to be derived under the California Vehicle Act. As the legislature did not leave the cities free to spend the fines collected for any municipal purpose, it can not be said that the purpose, or the sole purpose, of the legislature was to compensate the cities for the expenses to which they had been put in assisting in the enforcement of the California Vehicle Act. On the contrary, it must be held that the appropriation of such fines in the way they are appropriated was but a part of a state-wide plan of construction and maintenance of the public highways of the state, including the streets within incorporated municipalities, and it must be held that, by the California Vehicle Act, the state has assumed, and is bearing, a financial burden with regard to the construction and maintenance of city streets.

To reiterate: the fees provided for by subdivisions (*b*) and (*c*) of section 77 of the California Vehicle Act, together with other fees and charges collected under such act, are expended for the following purposes and none other: (1) the enforcement of the regulations of the California Vehicle Act; and (2) the construction, repair and maintenance of state highways, county highways and city streets.

But to revert to the case of *Sprout* vs. *South Bend.* This court held that it did not appear that the fees involved in that case were imposed for either of the two purposes enumerated.

As to the first, this court said:

"But it does not appear that the license fee here in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such a purpose. It follows that the exaction of the license fee can not be sustained as a police measure."

And as to the second, this court said:

"But no part of the license fee here in question may be assumed to have been prescribed for that purpose. A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways. And there is no suggestion, either in the language of the ordinance or in the construction put upon it by the Supreme Court of Indiana, that the proceeds of the license fees are, in any part, to be applied to the construction or maintenance of the city streets."

There are two thoughts contained in the last quotation which appellants may stress. The first is that the amount of use should be taken into consideration in fixing the fees, and the second is that where they are exacted for use of the streets of a certain city

they should be devoted to the construction and maintenance of such streets.

As to the amount of use: It is an undisputed fact in this case that appellants operate their vehicles exclusively within the State of California, and exclusively over the public highways of California, as the term *public highway* is defined by section 21 of the California Vehicle Act. (See Appendix.) As the licenses granted to appellants include the right to traverse all of such highways, and as those are the only highways they traverse, they can not be heard to say that they make no more than occasional use of such highways.

As to the expenditure of the fees: In the *Sprout* case the fees were exacted by the city for the use of its streets, and this court held that to justify such fees as a contribution to the cost of constructing and maintaining the highways under the city's jurisdiction it must appear that such fees were to be expended for the construction and maintenance of such highways. In this case the fees are exacted by the state, and not by the city, and to justify their imposition as a contribution to the construction and maintenance of highways it need not appear that they are to be expended upon the particular highways over which appellants operate their vehicles: it is sufficient if it appears that such fees are to be expended for the construction and maintenance of highways within the state's jurisdiction.

But even if it be assumed that the fees here in question are exacted as compensation for the use of highways which the state has constructed or maintains, as distinguished from the highways constructed and maintained by cities, and even if it be conceded that to justify the imposition of such fees as to appellants it must be made to appear that they make use of highways constructed or maintained by the state, still appellants' suit and plea is without merit.

Appellants, in their pleadings and in their brief, have assumed, and would like to have this court assume, that all streets within incorporated municipalities are constructed and maintained by those municipalities, and that neither the state nor the counties construct or maintain any highways within such corporate limits.

This assumption is unwarranted, as the following provisions of the laws of California manifest.

One statute provides:

> "The several counties, municipalities and road divisions of this state, within the limits of which may exist a state highway or highways under the jurisdiction and control of the state engineering department, are hereby empowered to do or order to be done on such highways any paving, curbing, street work or sewer work authorized by law; *provided, however,* that permission to do any such work shall first be obtained from the state department of engineering and all grades, elevations or curb lines sought to be established

or pavement proposed to be constructed by any county, municipality or road division shall first be approved by said engineering department of the state; *and provided, further,* that in case any existing pavement should be injured as a result of such work, such pavement shall be restored to the satisfaction of said engineering department."

Statutes of California 1919, chapter 95.

The other statute provides:

"Whenever county bonds shall be voted or a special tax levied for paving a county highway system, and the natural course of such highway system runs into or through any municipality, it shall be the duty of the county board of supervisors to include in, and pave such portion of, said system located within such municipality as may be designated by the mayor or other chief executive thereof and the county supervisor in whose district such portion of the highway is located, and said portion shall be constructed of the same width and materials (or equal thereto) as the highway approaching such municipality; *provided,* that in case such chief executive and such supervisor shall not agree as to what highway or highways shall be designated, then the chairman of the state highway commission shall designate the same and his judgment shall be final and conclusive."

Statutes of California 1921, chapter 195.

In addition to such statutes we would call the court's attention to section 365*d* of the Political Code of California, which provides in part:

"The California Highway Commission shall take and have full possession and control of all roads and highways which have been declared and adopted state roads and state highways, and all state roads and state highways which may hereafter be acquired or constructed * * *. Said commission is further empowered to relinquish to any county, city, or city and county, any portion of any state road or highway within said county, city, or city and county, with the consent of the board of supervisors of such county or city and county or governing body of such city and thereupon the title to said portion of said road or highway so relinquished shall revert to said county, city or city and county, as a county road or city street as the case may be * * *."

The provisions of the laws of California which we have quoted, including sections 169 and 170 of the California Vehicle Act, show that the state and the counties of the state do construct and maintain highways within the corporate limits of the cities of the state, and that the state and the counties do appropriate money to the cities to be used by them in the construction and maintenance of their streets. In the absence of a showing to the contrary, it is not to be assumed that the state or its several counties have made exceptions in these particulars as to the cities in which appellants operate their vehicles.

Appellants may argue that the use they make of state and county highways within the corporate limits of their respective cities is an incidental use and

differing in great degree from the use made of state and county highways by persons using those highways for the intersectional transportation of persons for hire and property. They may contend, also, that such sums as the state and counties appropriate to the cities for use by them in constructing and maintaining city streets is trivial in comparison to the sums expended by the cities for such purposes. Appellants may stress certain language which we have quoted from the case of *Sprout* vs. *South Bend, supra,* and argue that this difference in degree of use and this difference in degree of expense should have been taken into consideration in fixing the fees here involved.

While there may be some difference in degree of use, and some difference in degree of expense, those differences need not be taken into consideration, for to do so the state would have to undertake to license vehicles upon the basis of actual use made of the highways and in proportion to the actual expense of the state in constructing and maintaining those highways. As we have heretofore indicated, such an undertaking would entail a prohibitive amount of inspection and regulation, much to the public detriment.

Appellants also contend that the Legislature of 1927, in repealing the clause "for each such vehicle weighing, when unladen, less than 3000 pounds: $10," which theretofore had been contained in subdivision (*c*) of section 77 of the California Vehicle

Act, made the whole subdivision unconstitutional as offending the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

This contention is that as vehicles weighing less than 3000 pounds, when unladen, are now permitted to operate on the highways in the transportation of persons for hire or property, without the payment of any special fee, whereas vehicles used for the same purpose, but weighing in excess of 3000 pounds, when unladen, are required to pay a special fee, there is an unjust discrimination between persons similarly situated, and who are in direct competition with each other.

The answer to that contention is that the fees imposed are graduated according to the destructive propensities of vehicles, and that the Legislature, in exempting vehicles weighing less than 3000 pounds, when unladen, from the payment of special fees, has found that the destructive propensities of such vehicles are so slight as to justify such vehicles being placed in a special and exempted category. (See *Matter of Application of Schuler,* 167 Cal. 482.)

The soundness of that classification and exemption is evident, for such vehicles do not require the heavy type of pavement for their use that is required by vehicles of greater weight, and the damage they do to pavements is less than that done by heavier vehicles.

In the case of *Merchants' Bank* vs. *Pennsylvania,* 167, U. S. 461, 463, this court said:

"But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. Suppose, for any fair reason affecting only its internal affairs, the state should see fit to wholly exempt certain named corporations from all taxation. Of course the indirect result would be that all other property might have to pay a little larger rate per cent in order to raise the revenue necessary for the carrying on of the state government, but this would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to the provisions of the Federal Constitution."

And again:

"It was well said by Mr. Justice Williams, speaking for the Supreme Court of Pennsylvania, in the opinion in the present case: 'The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them that can stand.' Indeed, this whole argument of a right under the Federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap Railroad* vs. *Pennsylvania*, 134 U. S. 232, 237, in which case Mr. Justice Bradley, speaking for the court, said:

'The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable

ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them * * *. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt.' See also *Jennings* vs. *Coal Ridge Improvement Co.*, 147 U. S. 147."

See also *Florida Central & Etc. R. R. Co.* vs. *Reynolds*, 183 U. S. 471, 480.

The graduated income and inheritance tax statutes granting complete exemptions as to sums below a stated amount are directly comparable with the stat-

ute here in question. It has been held repeatedly that those statutes operate alike upon all persons similarly situated. See *Orr* vs. *Gilman*, 183 U. S. 178, 287. So, also, the present statute operates alike upon all persons similarly situated.

III

The Fees Here in Question Do Not Offend the Constitution of the State of California.

(A) Appellants contend that sublivisions (*b*) and (*c*) of section 77 of the California Vehicle Act offend section 21 of Article I of the Constitution of California, such provision being:

> "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature, *nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.*" (Italics ours.)

If we understand appellants' contention, it is that the exempting of vehicles weighing less than 3000 pounds, when unladen, from the payment of special fees violates such provision of the Constitution of the State of California. In answer to such contention it is sufficient to point out that the classification is of vehicles and not of persons, and that the exemption is offered to all persons upon the same terms. Furthermore, the classification and exemption of light weight vehicles is reasonable. See

In the Matter of the Application of Schuler, 167 Cal 282.

(B) It is also contended by appellants that subdivisions (*b*) and (*c*) of section 77 of the California Vehicle Act violate section 12 of Article XI of the Constitution of California, which constitutional provision reads as follows:

> "The Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

But the fees provided for by such subdivisions of such section of such act are not taxes imposed upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, but are taxes imposed for the privilege of using certain types of vehicles upon the public highways in the transportation of persons for hire or property. (*Matter of the Application of Schuler, supra.*) Furthermore, such fees, in so far as they are collected for county and city purposes, are authorized by section 36 of Article IV of the Constitution of California (see appendix, page 47) and even if they were not so authorized the result would be that section 159 of the California Vehicle Act would be

unconstitutional, leaving section 77 in full force and effect. (*Matter of the Application of Schuler, supra.*)

CONCLUSION

We respectfully submit that the decision of the court below should be affirmed.

Respectfully submitted.

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APPENDIX

I

Sections 21, 36, 49, 77, subdivisions (*a*), (*b*) and (*c*); 78, 79, 159, 160, 161 and 163 of the California Vehicle Act.

"Public Highway."

SEC. 21. Every highway, road, street, alley, lane, court, place, trail, drive, bridge, viaduct, or trestle laid out or erected as such by the public or dedicated or abandoned to the public, or intended or used by or for the general public, except such portions thereof as are used or prepared for use by pedestrians as sidewalks. The term "public highway" shall apply to and include driveways upon the grounds of universities, colleges, schools and institutions. The term "public highway" shall not be deemed to include private driveways, roads or places used by the owner, his guests and those having business with the owner and not intended to be otherwise used, or otherwise used by the general public.

Application for Registration.

SEC. 36. (*a*) Every owner of a motor vehicle, trailer or semitrailer which shall be operated upon the public highways of this state shall for each such vehicle owned, except as herein otherwise provided, apply to the division for the registration thereof.

(*b*) Application for the registration of a vehicle herein required to be registered shall be made upon the appropriate form furnished by the division and shall contain the name and address of the owner and legal owner, also a description of the vehicle, including the name of the maker, the motor number, the date first sold by the manufacturer or dealer to the consumer and such further description of the vehicle as shall be called for in the form, and such other information as may be required by the division.

(*c*) In the event that the vehicle to be registered should be a specially constructed, reconstructed or an imported vehicle, such fact shall be stated in the application, and upon the registration

of every imported motor vehicle which has been registered theretofore in any other state or country, the owner shall surrender to the division all number plates, seals, certificates of registration or other evidences of such former registration as may be in the applicant's possession or control.

Exceptions.

(*d*) The provisions of this act requiring the registration of certain vehicles shall not apply to special mobile equipment nor to implements of husbandry temporarily drawn, moved or otherwise propelled upon the public highways.

Registration Fee Must Be Prepaid.

SEC. 49. The division must not grant any application for registration, renewal of registration or transfer of registration of a vehicle nor issue any registration certificate or number plates provided for in this act to any person unless the correct fee therefor specified in this act shall have been paid.

Registration Fees.

SEC. 77. (*a*) A registration fee of three dollars shall be paid to the division for the registration of every motor vehicle, trailer or semitrailer, except for those which are exempted in this act, and such fee shall be paid at the time application is made for registration.

Fees for Electric Vehicles.

(*b*) In addition to the registration fee specified in subdivision (*a*) of this section, there shall be paid for the registration of every electric passenger motor vehicle a registration fee of ten dollars, and for the registration of every electric motor vehicle designed, used or maintained primarily for the transportation of passengers for hire, or for the transportation of property, there shall be paid fees according to the following schedule:

For each such vehicle weighing, when unladen, less than six thousand pounds	$50.00
For each such vehicle weighing, when unladen, six thousand pounds or more, but less than ten thousand pounds	70.00

For each such vehicle weighing, when unladen, ten thousand pounds or more ---------- 90.00

(c) The following registration fees in addition to the registration fee specified in subdivision (a) of this section shall be paid for the registration of vehicles, including trailers and semi-trailers, designed, used or maintained primarily for the transportation of passengers for hire, or for the transportation of property, according to the following table, except that the fees specified in this subsection need not be paid for electric vehicles. When such vehicles are equipped wholly with pneumatic tires:

For each such vehicle weighing, when unladen, three thousand pounds or more but less than six thousand pounds ---------- ~~$8.00~~ $15.00

For each such vehicle weighing, when unladen, six thousand pounds or more, but less than ten thousand pounds and limited under the provisions of this act to a total weight, including vehicle and load, not exceeding twenty-two thousand pounds -- 40.00

For each such vehicle weighing, when unladen, ten thousand pounds or more and limited under the provisions of this act to a total weight, including vehicle and load, not exceeding twenty-two thousand pounds ---------- 50.00

For each such vehicle weighing, when unladen, six thousand pounds or more and entitled under the provisions of this act to a total weight, including vehicle and load, in excess of twenty-two thousand pounds ---------- 70.00

Vehicles Not Equipped With Pneumatic Tires.

When such vehicles are not equipped wholly with pneumatic tires there shall be paid in addition to the fees specified in subdivision (a) of this section fees according to the weight thereof unladen amounting to twice the fees set forth in the foregoing table.

Fees for Less Than Year.

Upon registration issued after the beginning of the registration

year, the fees required under subdivisions (*b*) and (*c*) of this section shall be reduced by one-twelfth for each month which shall have elapsed since the beginning of the registration year.

Exemptions From Registration Fees.

SEC. 78. The registration fees specified in this act, except fees for duplicate number plates or certificates, need not be paid for any motor vehicle, trailer or semitrailer owned by any foreign government or by a consul, or other official representative thereof, or by the United States, or by any state or political subdivision thereof, or owned by a voluntary fire department organized under the laws of this state when such vehicles are used exclusively for fire-fighting purposes, nor for any like vehicle owned by or used exclusively in the operative work of such corporations as are taxed solely for state purposes under the constitution of this state, nor for any like vehicle used exclusively by a company in the operative work of its business of transportation of persons or property as a common carrier for compensation over any public highway of this state between fixed termini, or over a regular route, and subject to taxation under the provisions of section 15 of article XIII of the constitution of the State of California. All such vehicles shall be registered as herein required by the person having custody thereof and such custodian shall display official registration plates bearing distinguishing marks thereon which shall be furnished by the division free of charge.

Fees To Be Paid by Manufacturers and Dealers.

SEC. 79. The following fees shall be paid to the division for the registration of vehicles permitted by this act to be registered and registered under a general distinguishing number assigned to a manufacturer of or dealer in motor vehicles, in lieu of any other fees specified in this act; and such fees shall be paid at the time application is made for registration and for additional plates according to the following table:

(*a*) For the registration of motor vehicles other than motorcycles—

For the first set of number plates	$5.00
For each additional set of number plates	3.00

(*b*) For the registration of motorcycles—

For the first plate	5.00
For each additional number plate	1.00

(*c*) For the registration of trailers or semitrailers—

For the first plate	5.00
For each additional number plate	1.00

Motor Vehicle Fund.

SEC. 159. (*a*) There is hereby created in the state treasury a fund which shall be known as the "motor vehicle fund." The state treasurer shall deposit all money received by him from the division or otherwise under the provisions of this act into the motor vehicle fund.

(*b*) There is hereby appropriated out of such fund all moneys received as operators' and chauffeurs' license fees and duplicate operators' and chauffeurs' license fees and in addition thereto such portion of the remainder of such motor vehicle fund not exceeding in any registration year twenty-five per cent thereof as may be necessary for the maintenance of the division of motor vehicles to be expended by the division in carrying out the provisions of this act; ~~(and the division of motor vehicles is hereby authorized out of said funds to purchase real estate and erect such buildings as it may require, subject to the approval of the department of finance.)~~ There shall be deducted from the sums which the division is allowed to expend hereunder such amount as may be allowed to said division in each calendar year under budget appropriation by the state Legislature. The division may draw, without at the time furnishing vouchers and itemized statements, sums not to exceed in the aggregate one hundred thousand dollars, said sums so drawn to be used as a revolving fund where cash advances are necessary. At the close of each fiscal year the moneys so drawn must be accounted for and substantiated by vouchers and itemized statements submitted to and audited by the board of control and by the controller. The balance of said fund, after the expenditure of so much as may be permitted by this act for the support of the division of motor vehicles, shall be known as the "net receipts" and shall be devoted to the purposes and in the manner herein specified.

(*c*) One-half of such "net receipts" is hereby appropriated and shall be paid from the motor vehicle fund to the counties of this state in proportion to the number of vehicles registered in such counties as determined by the places of residence of the owners to whom the registration certificates are issued. All amounts paid under this section to the counties shall be deposited in the road funds of the several counties receiving the same and shall be expended by such counties exclusively in the construction and maintenance of public roads, bridges and culverts in said counties respectively; *provided,* that the board of supervisors of any county may in its discretion expend any portion of such sums so received by such county in the construction, maintenance and repair of streets, bridges and culverts within those incorporated cities therein the legislative bodies of which by ordinance authorize such work of construction, maintenance and repair. The board of supervisors of any county, or city and county, may also in its discretion expend any portion of such sums so received by such county, or city and county, for payment of interest upon, or redemption of bonds, the proceeds of which have been used for the construction, maintenance and repair of streets, bridges and culverts within such county, or city and county. The board of supervisors of any county, or city and county which is empowered by law to expend money for the construction of public highway outside of its corporate limits, may expend any portion of the amounts paid to the said county, or city and county, and deposited in the special road improvement fund or other road fund thereof, as herein in this section directed, in and for the construction of public highways outside of its corporate limits; *provided, however,* that the construction thereof is authorized by ordinance of the board of supervisors of the county or city and county, in which said highway is to be constructed. Where such authorization is given by ordinance, as herein provided, the board of supervisors of the county, or city and county desiring the said construction, may, through its own boards, officers or commissions expend the amounts herein authorized to be expended, or may, by ordinance of its board of supervisors, transfer said amounts to the account of the highway commission of the State of California and may by said

ordinance specify and determine the route and type of construction of said highway, and the said amount thus transferred shall, if accepted by the said highway commission, be expended by said commission for the purpose specified and determined in said ordinance, and not otherwise.

(*d*) The board of supervisors of each county in the state shall establish a road fund in the county treasury for the receipt of such funds received, as hereinbefore provided, and shall also make an annual report to the state department of public works not later than three months after the close of the counties' fiscal year, upon forms to be provided by the state department of public works, showing the amount of moneys received from the motor vehicle fund during the preceding fiscal year and the disposition of said moneys, specifying in such detail as may be required by said department the roads, bridges and culverts constructed or maintained out of said moneys and the sums applied to the several items of such construction or maintenance.

(*e*) The state controller shall in the months of February and August of each year draw his warrants upon the motor vehicle fund in favor of the county treasurer of each county for the amount to which said county is entitled hereunder, except that the state controller shall not draw his warrant upon the motor vehicle fund in favor of the county treasurer of any county which has not established a road fund, as required hereunder, or which has failed, neglected or refused to file the report showing the amount of money heretofore received by such county from the motor vehicle fund and the disposition thereof, as hereinbefore required, until such county has established a road fund and shall make the reports herein required; *provided, however,* that in cases where the actual domicile, residence or place of abode of an owner, or part owner, of any motor vehicle, trailer or semitrailer is in a different county than the place which such owner has designated as his place of residence in his registration certificate, the county auditor of the county receiving such funds from the state as hereinabove provided may draw his warrant in favor of the county containing the actual domicile, residence, or place of abode of such owner, or part owner, in such sums as may properly be attributed to the latter county.

(*f*) All moneys remaining in the motor vehicle fund after the expenditures hereinbefore in this section authorized, together with all sums that have been heretofore or that may be hereafter appropriated by the Legislature for the same purpose, shall be paid into the state highway maintenance fund and shall be expended under the direction of the state department of public works for the maintenance, repair, widening, resurfacing and reconstruction of state roads and highways under the jurisdiction of said department and for the maintenance, repair, widening, resurfacing and reconstruction of roads and highways in state parks, subject to the approval of the official or officials charged by law with the management and control of such parks, such money to be so drawn from the motor vehicle fund for the purpose of such maintenance, repair, widening, resurfacing and reconstruction upon warrants executed by the state controller upon demands made by the state department of public works and allowed and audited by the state board of control.

Disposition by Cities of Fines and Forfeitures.

SEC. 160. (*a*) All fines or forfeitures collected upon conviction or upon the forfeiture of bail of any person charged with a violation of any of the provisions of this act constituting a misdemeanor following an arrest of such person by an officer employed by a city, shall be paid into the city treasury and deposited in a special fund to be known as the "street improvement fund" which is hereby created and which shall be used exclusively in the construction, maintenance and improvement of public streets, bridges and culverts within such city. Failure, refusal or neglect to comply with any of the provisions of this section shall constitute misconduct in office and shall be ground for removal therefrom.

Disposition of Other Fines and Forfeitures.

(*b*) All fines or forfeitures collected upon conviction for violation of any of the provisions of this act following arrest by any officer employed by the state or by a county or city and county and whether collected by a justice of the peace, police court, city recorders court, city justice of the peace or otherwise shall be paid to the treasurer of the county or incorporated

city and county in which the court is held and said moneys shall belong to such counties and cities and counties respectively and shall be used by the several counties and incorporated cities and counties solely in the construction, maintenance and improvement of roads, streets, bridges and culverts within their respective limits and for no other purpose.

Constitutionality of Act.

SEC. 161. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The Legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause and phrase hereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared unconstitutional.

Title.

SEC. 163. This act shall be known and cited as the "California vehicle act."

II

Section 36 of article IV of the constitution of California:

State Highway System Authorized.

SEC. 36. The Legislature shall have power to establish a system of state highways or to declare any road a state highway, and to pass all laws necessary or proper to construct and maintain the same, and to extend aid for the construction and maintenance in whole or in part of any county highway.

III

The decision of the federal court in the case of *Martine* vs. *Kozer*, 11 Fed. (2d) 645:

Wolverton, District Judge. This is a suit instituted by a large number of persons, owners of motor vehicles, in behalf of themselves and all others similarly situated, against the Secretary of

State of the state of Oregon, to enjoin him from exacting the annual registration or license fees for motor vehicles, imposed by chapter 371 of the 1921 General Laws of the State, as being in contravention of the Rural Post Roads Act of Congress of July 11, 1916 (chapter 241, 39 Stat. 355 [Comp. St. §§ 7477a-7477i]), as amended February 28, 1919 (chapter 69, 40 Stat. 1189, 1200 [Comp. St. Ann. Supp. 1919, § 7477bb et seq.]), and the Federal Highway Act of November 9, 1921 (chapter 119, 42 Stat. 212 [Comp. St. Ann. Supp. 1923, §§ 7477¼–7477¼y]), whereby it is declared that all highways constructed under the provisions thereof "shall be free from tolls of all kinds." The bill of complaint is challenged by motion to dismiss.

The state act is general in its purpose and application, designed for governing the use of roads and highways within the state by motor vehicles of all kinds, and including, among other subjects, rules of the road, equipment, brakes, etc., registration of motor vehicles, etc. Registration is required to be made annually with the secretary of state. By section 25 of the act, annual license fees, which are graduated from $3 up to $97 per vehicle, according to style and weight of the car, are required to be paid by the owner. The license fees on motor trucks, trailers, and semitrailers are graduated upon a different basis, and in some instances are higher than on machines classed as motor vehicles.

By its section 26 the act exempts such motor vehicles and trucks from the payment of all other taxes and licenses, except municipal license fees. Section 44 provides in effect that all moneys received by the secretary of state from this source shall be deposited with the state treasurer. After the payment of the expenses of administering the act, three-fourths of the fund thus accumulated must be transferred to the state highway fund for such purposes as are provided by law, and the remaining one-fourth is required to be remitted by warrant of the secretary of state to the county treasurers of the counties, to be deposited (section 45) to the credit of the "motor license fund" which is required to be created in each county. By section 46 the funds thus accumulated may be used for the payment of interest and retirement of bonds issued for the construction and improvement

of roads, or to defray the expenses of preparing the roadbed, bridges, etc., for construction of state highways, or, under certain conditions, in the discretion of the county court, in any other manner for general road purposes.

By section 8, chapter 383, General Laws of Oregon of 1921, the state highway commission is authorized to pay the principal and interest upon highway bonds, as the same shall become due, from any funds subject to its control, from whatever source the same may come, without regard to the origin of said funds. The single ground upon which plaintiffs predicate their right for relief is that the registration or license fees exacted on motor vehicles are, in legal contemplation, a toll for the right to travel upon and to use the highways of the state, constructed or reconstructed in part under and in pursuance of the acts of Congress above cited, and by the aid of appropriations from the general government, and therefore that such exactions are void and unenforceable.

We had occasion in an analogous case, Anthony et al. v. Kozer, Secretary of State (D. C.) 11 F. (2d) 641, to examine into the characteristics of a toll, as within the intendment of the acts of Congress relating to rural post roads and federal highways, and held that an excise tax exacted from dealers engaged in vending gasoline to be used for propelling motor vehicles upon the highways of the state was not a toll inimical to the denunciation of Congress. The registration or license fees here involved do not purport to be a charge for traveling upon the public highways of the state, or for the right to use such highways for traffic thereon. If such fees can be regarded as tolls, it must be because of their indirect effect as relating to travel upon and the use of such roads by the general public. That they do not affect the whole public is demonstrable by the suggestion that persons operating motor vehicles through the state are not required to pay the registration or license fees, so that as it respects nonresidents the highways are absolutely free from tolls of any kind. Such nonresidents, however, are subject to the regulatory features of the law, as it relates to traffic on the highways, the same as residents operating motor vehicles thereon.

It cannot be doubted that chapter 371 of the General Laws of Oregon of 1921 is an act adopted in pursuance of the police

powers of the state, and that the requirement relating to the registration of motor vehicles, with an exaction of registration or license fees is an element or subject pertaining to the police powers. Now we have recent authority from the Supreme Court that such regulation, in so far as it might impinge upon the interstate commerce clause of the Constitution, if it is reasonable and not arbitrary or despotic, is entirely within the authority of the Legislature acting within the police powers of the state to enact. I refer to the cases of Hendrick v. Maryland, 35 S. Ct. 140, 235 U. S. 610, 59 L. Ed. 385, and Kane v. New Jersey, 37 S. Ct. 30, 242 U. S. 160, 61 L. Ed. 222.

The Hendrick Case covers so fully the conditions that prevail here and elsewhere, respecting highways and the nature of motor vehicle traffic, that I may be pardoned in quoting at length from the opinion, respecting the general facts as well as the law applicable:

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic, the state of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction, the state put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious.

"In the absence of national legislation covering the subject a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registra-

tion of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse power of the engines—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of the health, safety, and comfort of their citizens, and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the state's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress.
• • •

"In view of the many decisions of this court there can be no serious doubt that, where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself, and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard they constitute no burden on interstate commerce."

The Kane Case, as it respects the power of state regulation, reaffirms the doctrine of the Hendrick Case. The court there says:

"The power of a state to regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. It extends to nonresidents as well as to residents. It includes the right to exact reasonable compensation for special facilities afforded as well as reasonable provisions to insure safety, and it is properly exercised in imposing a license fee graduated according to the horse power of the engine."

It is a dogma of legislation that the action of the state must be treated as correct unless the contrary is made to appear (Hendrick Case, page 624 [35 S. Ct. 143]), and it was further said:

"In the instant case there is no evidence concerning the value of the facilities supplied by the state, the cost of maintaining them, or the fairness of the methods adopted for collecting the charges imposed, and we cannot say, from a mere inspection of the statute, that its provisions are arbitrary or unreasonable."

The registration or license fees are denominated by the Supreme Court of Oregon a privilege tax. Briedwell v. Henderson, 195 P. 575, 99 Or. 506; Northwest Auto Co. v. Hurlburt, 207 P. 161, 104 Or. 398; Camas Stage Co., Inc., v. Kozer, 209 P. 95, 104 Or. 600, 25 A. L. R. 27. And Mr. Justice McBride, very cogently and lucidly, gives reasons for so calling it:

"That purpose, in a nutshell, was to require the owners of motor vehicles to make good to the state the extra damage and wear and tear caused by the use of the vehicles upon its highways. The use of motor vehicles upon the roads was comparatively an innovation, having grown to its then proportions in the space of a few years. For such use better and more permanent roads and roadbeds were required than for the comparatively light vehicles theretofore employed. Their weight and swiftness were calculated to work serious injury to the roadbeds prepared for lighter and slower vehicles, and necessitated highways more permanently constructed and more frequent repairs to those already in use." 104 Or. 407 (207 P. 164).

And he further declares:

"As a police measure, it was nothing more than fair that the agencies causing and requiring this extra expense should be required to pay for it."

And in the Henderson Case, supra (page 518 [195 P. 579]), the court further declares:

"We cannot say that the license fee exacted for the privilege of operating motor vehicles upon the highways of this state is unreasonable."

[1] If such a tax or license fee is not inimical to the interstate commerce clause of the Constitution, it is not at all clear or obvious that it contravenes the clause respecting tolls of any kind as found in the Rural Post Roads and Federal Highway Acts. Indeed, it would seem that, on the contrary, it does not. The state act, being a police regulation, must be deemed to be regular and valid, unless it appears on its face to be an unreasonable and arbitrary exercise of the police power, or is made so to appear by clear and cogent showing aliunde. Such a showing has not been attempted. I am in accord with the Supreme Court

of the state, that the state regulation, upon its face, is not an arbitrary nor despotic exercise of the police power.

Further than this, as we said in the Anthony Case, the tax lacks the characteristics of a toll. "In its general acceptation, toll is 'a settled, certain and defined sum exacted for the use of a common passage; a tribute or custom paid for passage, or a duty imposed on goods and passengers traveling public roads, bridges, etc.; a tribute for passage; * * * a tax paid for some use or privilege or other reasonable consideration; the consideration for the use of a road or bridge, not compensation for carriage over it; a tribute or custom paid for passage; something taken for a liberty or privilege.' 38 Cyc. 359."

And we further said:

"No doubt the Congress had in mind, in adopting the clause, 'All highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds,' the many toll roads of the country that were in years previous constructed through grants of public lands and bounties appropriated by the general government, and on which, for the privilege of passage, the proprietors were permitted to exact tolls, and it was adopted as a policy that no tolls of any kind should be exacted for the privilege of passage over the rural post roads for the construction of which the government was to appropriate its public funds. Such is obviously the intendment of the acts of Congress in extending aid to the states for construction and maintenance of their roads, and highways. The excise tax here provided for has no relation to the tolls inhibited by the acts of Congress, and is therefore not to be condemned as such."

So we say here the registration or license fees here exacted have no relation to the tolls inhibited by the acts of Congress, and are not to be condemned as such.

[2] I am persuaded, therefore, that the registration or license fees, or privilege tax, as designated by the state Supreme Court, here imposed are not a toll of any kind within the intendment of the acts of Congress cited, and therefore that the state legislation is not void, as contended by complainants.

Motion to dismiss sustained.

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In the Supreme Court
OF THE
United States

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Nos. 86, 267

OCTOBER TERM, 1929

CARLEY & HAMILTON, INC.; EDWARD MALDE, doing business as A. B. C. TRANSFER & STORAGE COMPANY; S. BRIZZOLARA, etc., et al.,
86 *Appellants,*

vs.

FRANK G. SNOOK, as Chief of the Division of Motor Vehicles, State of California.

GEO. T. COTTINGHAM and WILLIAM C. MEGINNES, doing business as CITY TRANSFER COMPANY, et al.,
267 *Appellants,*

vs.

FRANK G. SNOOK, as Chief of the Division of Motor Vehicles of the State of California and RAY L. RILEY, as State Controller of California.

Appeals from the District Court of the United States for the Northern District of California

APPELLANTS' PETITION FOR REHEARING.

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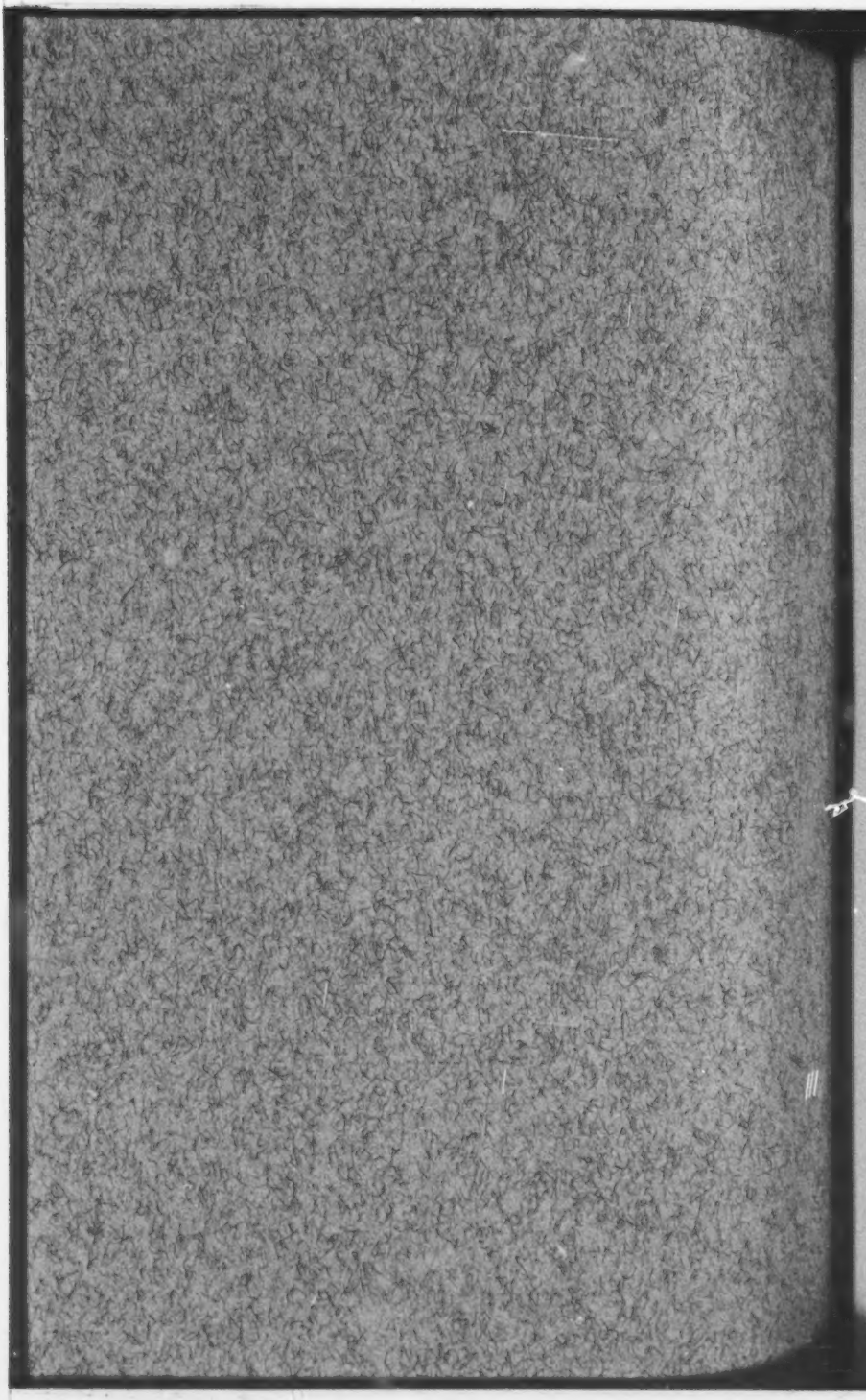

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APPELLANTS' PETITION FOR REHEARING.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the appellants in the above entitled causes and ask this Honorable Court for a rehearing of the above entitled causes and for a vacation of its certain decree made and entered on January 24th, 1930, and show:

I.

This Honorable Court has decided that all vehicles weighing, unladen, less than 3000 pounds, even though there is no limit to the size of their load, are properly exempted from the payment of weight fees and that the equal protection clause of the 14th Amendment and Section 21, of Art. I of the State Constitution do not protect the said appellants.

In delivering the opinion of this Court Mr. Justice Stone said:

> "That the Legislature may graduate the fees according to the propensities of the vehicles to injure or to destroy the public highways, and may exempt those with respect to which this tendency is slight or non-existent, cannot be doubted. We may not assume that vehicles weighing less than 3000 pounds, with loads which they usually carry, are not of this class, or that vehicles weighing more than 3000 pounds with their accustomed burden added do not have this tendency. It is for the Legislature to draw the line between the two classes."

It would appear that the Honorable Justice, as well as the other members of this Honorable Court, evidently overlooked certain portions of the transcripts and the briefs on such matter. It would be found that the Legis-

lature, in 1927, amended the registration fees named in Subdivision (c) by repealing the following:

> "For each such vehicle weighing, when unladen, less than 3000 pounds, $10.00."

By such amendment many thousands of vehicles transporting passengers for hire or property have been freed from said fees under said Subdivision (c), although said vehicles weigh more than 6000 pounds when loaded (R. p. 24, No. 86).

Again it is found in No. 267, Record, pages 5 and 6, that since December 31st, 1928, there are many thousands of motor vehicles, which weigh, when unladen, less than 3000 pounds, but carry more than 3000 pounds additional, making the total weight of more than 6000 pounds, and the owners thereof pay no charges under the amended registration fees, while they are in direct competition with the appellants and others. Said competition has already caused the plaintiffs and others a damage of more than $200,000.00; that every day said plaintiffs and said others are being so damaged and that they cannot recover any of said losses from said owners, who have been granted said privileges and immunities under the provisions of said Subdivision (c).

In No. 267, p. 25, it is shown that 130,125 vehicles weighing less than 3000 pounds paid under Subdivision (c) in 1928, $10.00 per vehicle, but since December 31st, 1928, no vehicles weighing less than 3000 pounds pay any charges under said Subdivision (c).

Your Honorable Court evidently overlooked the fact that Subdivision (b) provides that "for each such vehicle

weighing, when unladen, less than 6000 pounds—$50.00". In other words, electric vehicles used for the transportation of passengers for hire, or the transportation of property pay $50.00 even though the vehicle weighs less than 3000 pounds.

It cannot be assumed, as was stated in the opinion, that vehicles weighing less than 3000 pounds do not injure or destroy the public highways, and may therefore be exempted from the payment of any charge whatsoever.

We submit that the decisions cited by our brief found in pages 45-56 of No. 86 show that the appellants are being deprived of their rights under the 14th Amendment and the Constitution of California.

II.

This Honorable Court has decided that the registration fees under Subdivision (c) do not infringe upon those provisions of the Rural Post Roads Act and the Federal Highway Act prohibiting tolls of all kinds.

In delivering the opinion, Mr. Justice Stone said:

> "The fact that registration fees are imposed generally upon all residents who use motor vehicles within the State, without reference to any particular highways or to the extent or frequency of the use, and that, as in California, they are not exacted of non-resident automobilists passing through the state (1923 California Statutes, c. 266 S. 47), marks them as demands of sovereignty, not of proprietorship, and likens them to taxes rather than tolls. The fact that they may have been held justified, in other con-

nections, because of their similarity to 'tolls for the use of highways' affords no basis of saying that the present fees are prohibited tolls within the meaning of the Federal Highway Act."

In the first place, we call attention to the fact that said Section 47, Chapter 266, Statutes of 1923, was amended by the Legislature in 1927 (Statutes of 1927, Chapter 752), by adding the following, to-wit:

> "except that the privileges granted in this section shall not apply to any motor vehicle operated within this state for the transportation of persons or property for compensation".

As the principal reason set out in the opinion of your Honorable Court has been based on a Statute of 1923, which has been repealed by a Statute of 1927, the said Statute of 1923 cannot be the basis of the decision.

In the opinion it is said that because the appellants are compelled to pay such registration fees under Subdivision (c) without reference to any particular highways, or the extent or frequency of the use is a mark of the demands of sovereignty, not of proprietorship, in other words, a tax. No citation of any decision to support such announcement is given.

We cited a large number of cases in Pars. II and V in the brief in No. 86, and also in Pars. VII and VIII in No. 267. This Honorable Court has decided that the States, prior to the adoption by the State of the Post Rural Road Act of 1916, could raise money for the improvement of highways by tolls.

See *Kane v. New Jersey*, found on pages 22, 23 of the brief in No. 86. This case arose in the State Court and the Court held that the registration fee in New Jersey was a "toll", and necessarily it was not based upon the sovereignty of the State. The payment of the registration fee gave the right to use all the highways of New Jersey. This Honorable Court affirmed the decision.

In the *Hendricks v. Maryland*, this Honorable Court held that the registration fee of Maryland was a toll and not a tax, imposed by the State, although Hendricks had the right to use every highway in Maryland.

If the registration fees in Subdivisions (b) and (c) are taxes, then this Honorable Court will be compelled to reverse the said *Kane* and *Hendricks* cases, as a tax, impost or duty, or the commerce clause of the Constitution will be violated. For instance there are some persons who are using their motor vehicles for the transportation of passengers for hire or transporting property between California and Oregon, just like Kane and Hendricks. Will this Honorable Court decide that such subdivisions are taxes instead of tolls, and therefore in violation of the Commerce Clause?

As was said by Mr. Justice Field in delivering the opinion of the Court:

> "There is no analogy between the imposition of taxes and the levying of tolls for the improvement of highways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading. Taxes are levied for the support of the government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property, or of the

improvements and considerations of the return which such values or expenditures should yield. * * *

"And to meet the cost of such improvement, the states may levy a general tax or lay a toll upon all those who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. Huse v. Glover, 119 U. S. 543, 548 (30:487)."

Sands v. Manistee River Improvement Co., 123 U. S. 288, 294, 31 L. Ed. 149, 151.

In our briefs we cited the case of *Sprout v. South Bend.* In the opinion it was said that the proceeds from the license fees were not applied to the construction or maintenance of the city streets, and it compared *Tomlinson v. Indianapolis,* 144 Ind. 142, 36 L. R. A. 414, 43 N. E. 9; *Terre Haute v. Kersey,* 159 Ind. 300, 95 Am. St. Rep. 296, 64 N. E. 469; *Hogan v. Indianapolis,* 159 Ind. 523, 65 N. E. 525 (see No. 86, brief page 39). We refer to these cases in our brief No. 86, pages 30 and 31, in which the Supreme Court of Indiana decided that the registration fees are tolls.

The Justices of Massachusetts held that the registration fees in Massachusetts were tolls, whether or not the vehicles operated on any particular highway. The opinion cites a large number of cases including *Kane v. New Jersey, Standard Oil Company v. Brodie* and *Hendricks v. Maryland* (see No. 86, brief, pp. 28, 29 and 30).

We also cited three cases in different states holding that the registration fees were tolls, although there was only a charge for the use of all the highways (see No. 86, brief, p. 31).

We cited also the case of *Matter of Schuler* in No. 86, page 24. In the opinion the State Supreme Court relied upon the decision of the Supreme Court of Arkansas and in the opinion therein the license fees were tolls (see *Ft. Smith v. Scruggs*, No. 86, page 24).

Congress enacted the Rural Post Roads Act on July 11th, 1916 (Chap. 241, 39 Stat. at line 355). Congress before it enacted this Act, had before it all of the decisions of the Supreme Court, decisions of the courts of the various States, as well as the acts of Congress, and when Congress

> *"Provided, that all roads constructed under the provisions of this act shall be free from tolls of all kinds,"*

and also in Section 3 it is provided,

> *"That in states where the constitution prohibits the state from engaging in any work of internal improvement, then the amount of the appropriation under this act apportioned to any such state shall be turned over to the highway department of the state or to the governor of said state to be expended under the provisions of this act and under the rules and regulations of the Department of Agriculture,"* etc. * * *

its intention was plainly evident. When Congress amended the Post Roads Act by the Federal Highway Act the latter contained the same provisions.

In other words Congress informed the States that if a State wished to receive the benefit of Federal Aid, it must assent to the provisions of the Act, including the prohibition against "tolls of all kinds". California in 1917 did assent to be bound by the provisions of the Post Rural Roads Act, and therefore the State is com-

pelled to finance the construction of its highway system by bonds and the aid from the moneys allotted by Congress under the said Act. The State had already issued bonds in the amount of $18,000,000 for the acquisition of a system of State highways (Chap. 83, Stat. 1909). Again in 1915, $15,000,000 of bonds were issued for extensions of the original State highway system (Chap. 404, Stats. 1915). Section 2, Art. XVI of the Constitution was adopted at a special State election in 1919 (Chap. 46, Stats. 1919), and provided for a State bond issue of $40,000,000 for the construction of certain additional State highways.

Since then the State has never issued any further bond issues for the construction of any additional highways, or for the improvement of any highways in the State, but in 1923, the State enacted the "California Vehicle Act" of 1923 (Chap. 226, Stats. of 1923).

In 1916, the time of passage of the Post Road Act, the State received about $250,000 from the registration fees from about 180,000 motor vehicles. In the year 1930, the State will receive above $45,000,000 from the registration fees, and the Motor Fuel Act, not including other taxes which are imposed on 1,900,000 motor vehicles.

This Honorable Court held that:

> "There was no intention that the State would reap profit out of this grant by the Government, but the State was to profit from the construction of such internal improvements wholly within the State by the completion and operation of such canal."
>
> *U. S. v. Michigan*, see Brief in No. 267, pp. 33, 34.

We cited many decisions in our briefs No. 86 and No. 267 on this question, and we refer to our briefs on same.

In conclusion, we earnestly submit that this Honorable Court should vacate and set aside the decree entered on February 24th, 1930, and that the appellants in said causes shall be entitled to the relief asked for in their bills of complaint.

W. R. Crawford,
J. F. Vizzard,
Edwin C. Ewing,
Henry G. Hotchkiss,
Solicitors for Appellants.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 267

GEO. T. COTTINGHAM AND WILLIAM C. MEGINNES, DOING BUSINESS AS CITY TRANSFER COMPANY, ET AL., APPELLANTS,

vs.

FRANK G. SNOOK, AS CHIEF OF DIVISION OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, AND RAY L. RILEY, AS STATE CONTROLLER OF THE STATE OF CALIFORNIA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED JULY 29, 1929

(34,398)

(34,398)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 26, 1929

[fols. a-1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

In Equity. No. 2389S

GEO. T. COTTINGHAM and WILLIAM C. MEGINNES, Doing Business as City Transfer Company; San Jose Transfer & Storage Company, a Corporation, and Union Ice Company, a Corporation, Plaintiffs,

vs.

FRANK G. SNOOK, as Chief of the Division of Motor Vehicles, State of California, and Ray L. Riley, as State Controller of the State of California, Defendants

BILL OF COMPLAINT—Filed June 15, 1929

To the Honorable Judges of the District Court of the United States for the Northern District of California, Southern Division, sitting in equity:

The plaintiffs bring this bill of complaint, on behalf of themselves and on behalf of all persons, firms, associations and corporations simliarly interested or situated and entitled to receive the benefits herein, against Frank G. Snook, as Chief of the Division of Motor Vehicles, State of California, and Ray L. Riley, as State Controller of the State of California, defendants, and thereupon plaintiffs complain of the said defendants and show unto your Honors as follows:

I

The plaintiffs, Geo. T. Cottingham and William C. Meginnes, doing business as City Transfer Company, have been for some years and are now carrying on their business at Watsonville, California; their business is to trans- [fol. 2] port property in their motor vehicles using the streets of Watsonville, California, and also the highways outside of the limits of said city; their business amounting to more than $20,000 yearly would be absolutely de-

stroyed if they are prevented from using said streets and said highways by their motor vehicles; they have paid in advance this year $322.00 under subdivision (c) of Section 77 of the "Motor Vehicle Act" to the defendant Snook and will pay said charge on at least one additional truck after the 1st of July, 1929 so as to carry on their business or their business will be irreparably damaged. The plaintiff, San Jose Transfer Company, is and has been a Corporation duly organized and existing under and by virtue of the laws of the State of California with its principal office in San Jose; its business is to transport property in its motor vehicles using the streets of San Jose, California; and also the highways outside of said City; its business, amounting to more than $50,000 yearly, would be absolutely destroyed if it is prevented from using said streets and said highways by its motor vehicles; it has paid in advance this year $505.00 under said subdivision (c), as aforesaid, to said defendant Snook and will pay said charges on at least one additional truck after the 1st of July, 1929, so as to carry on its business or its business will be irreparably damaged. The plaintiff, Union Ice Company, is and has been for years a corporation duly organized and existing under and by virtue of the laws of the State of California with its principal office in San Francisco, and with branches in many of the other cities of said State; its business compels it to carry its products by motor vehicles using the streets of many cities and also the highways outside of said cities in said State; its busi-
[fol. 3] ness amounting to more than $1,000,000.00 yearly would be absolutely destroyed if it is prevented from using said streets and said highways by its motor vehicles; it has paid in advance this year more than $15,000.00 (at this time it is not able to show the exact amount) under the said subdivision (c) to the defendant Snook, and moreover it must pay said charges on many additional trucks after July 1st, 1929 or its business will be irreparably damaged, as such additional trucks are needed to take care of the summer trade.

II

That the said defendant Frank G. Snook, as Chief of the Division of Motor Vehicles, State of California, has been for some years last past and is now duly appointed,

qualified and acting chief of the Division of Motor Vehicles, residing at Sacramento; the said defendant Ray L. Riley has been for many years last past and is now the duly elected, qualified and acting State Controller of the State of California, residing at Sacramento.

III

The State of California enacted the "California Vehicle Act," being Chapter 226, Statutes of 1923, as amended by Chapter 240, Statutes of 1925, and by Chapters 752, 844 and 864, Statutes of 1927. Said act, as amended, is in full force and effect, and is herein referred to and made a part hereof, the same as if set out in full.

Under the provisions of said Act, as amended, the defendant, as Chief of Division of Motor Vehicles has the sole jurisdiction, and it is his duty to enforce all the provisions of said Act (Sections 29, 30, 37).

[fol. 4] That every owner of a motor vehicle, trailer or semi-trailer, which shall be operated upon the highways is compelled to register the vehicle (Sec. 36). Every vehicle registration shall expire at midnight on the Thirty-first day of December each year, and shall be renewed annually (Sec. 44).

The said defendant Snook cannot grant an application for registration or issue registration or number plates, unless the correct fee be paid (Sec. 49). It shall be unlawful and constitute a misdemeanor for any person to operate any motor vehicle, trailer or semi-trailer upon at public highway which shall not be registered and registration fees have not been paid (Sec. 51).

Registration Fees

Sec. 77. (a) A registration fee of Three Dollars shall be paid to the Division for the registration of every motor vehicle, trailer or semi-trailer except for those which are exempted in this Act, and such fee shall be paid at the time application is made for registration.

Fees for Electric Vehicles

(b) In addition to the registration fee specified in subdivision (a) of this Section, there shall be paid ten dollars, and for the registration of every electric motor ve-

hicle designed, used or maintained primarily for the transportation of passengers for hire, or for the transportation of property, there shall be paid fees according to the following schedule:

—, less than six thousand pounds $50
—, less than ten thousand pounds $70
—, ten thousand pounds or over $90

Fees for Motor Vehicles

(c) The following registration fees in addition to the registration fee specified in sub-division (a) of this section shall be paid for the registration of vehicles, including trailers and semi-trailers, designed, used or maintained primarily for the transportation of passengers for hire or for the transportation of property, according to the following table:

[fol. 5] When such vehicles are equipped wholly with pneumatic tires - - - when unladen, three thousand pounds or more and less than six thousand pounds $15.00
- - - when unladen, six thousand pounds or more, but less than ten thousand pounds and limited - - - to a total weight, including vehicle and load, not *to* exceeding twenty-two thousand pounds 40.00
- - - when unladen, ten thousand pounds or more, - - - a total weight, including vehicle and load, not exceeding twenty-two thousand pounds 50.00
- - - when unladen, six thousand pounds or more and - - - a total weight, including vehicle and load, in excess of twenty-two thousand pounds.. 70.00

Vehicles Not Equipped with Pneumatic Tires

When such vehicles are not equipped wholly with pneumatice tires there shall be paid in addition to the fees specified in sub-division (a) - - - twice the fees set forth in the foregoing table."

Upon registration issued after the beginning of the registration year, the fees required under sub-divisions

(b) and (c) shall be reduced by one-fourth for each three months which shall have elapsed since the beginning of said registration year (Sec. 77).

Every person operating unlawfully is punished by a fine of not to exceed $500, imprisonment in the county jail for not to exceed six months, or by both such fine and imprisonment—moreover the registration fee and penalty constitute a lien upon the vehicle upon which the same are due and it is the duty of said defendant to collect such fee and penalty by seizures of such vehicle and by the sale of such vehicle (Sec. 81).

Legislative bodies of counties and cities are given the power to license for revenue and regulate the operation of vehicles transporting persons for hire and transporting property (Sec. 145).

The defendant Snook shall deposit in the State Treas- [fol. 6] ury to the credit of the motor vehicle fund all moneys collected during the preceding business day (Sec. 157). A motor vehicle fund was created and the State Treasurer must deposit all moneys received by him from the defendant in said motor vehicle fund. The balance of said fund after the expenditure of so much as may be permitted for the support of the Division of Motor Vehicles, but not more than 25%—collected, shall be divided, one half shall be paid to the counties in proportion to the number of vehicles registered in said counties as determined by the places of residences of the owners. All amounts paid to the counties shall be deposited in road funds and shall be expended exclusively in the construction and maintenance of public roads, bridges and culverts in said counties, and the other half is expended solely for the maintenance, repair, widening, resurfacing and reconstruction of State and State park roads. The defendant, Riley, as State Controller, is ordered to draw warrants upon the motor vehicle fund in the months of February and August (Sec. 159).

IV

The plaintiffs allege that prior to the Amendments of 1927, which went into force and effect after December 31, 1928, said sub-division (c) was as follows:

"For each such vehicle weighing when unladen, less than 3,000 pounds..... $10;"

Also by the Amendments the charges were increased about 25% in sub-division (b) and 250% in sub-division (c). Since December 31, 1928, there are many thousands of motor vehicles transporting persons for hire or transporting property which only weigh, when unladen, less than 3,000 pounds, but carry in some instances more than 3,000 pounds, and the owners thereof pay no charges under the [fol. 7] present subdivision (c), but are indirect competition with the plaintiffs and all persons, firms, associations and corporations who have and will in the future pay said charges before they can use their motor vehicles for the transporting of persons for hire or transporting property, or the defendant Snook will enforce said law. Said competition has already caused the plaintiffs and all others compelled to pay such charges under said subdivision (c) at least $200,000.00 in damage to and loss of business, and every day said plaintiffs and said others are being so damaged as aforesaid, and they cannot recover any of said losses from said owners, who have been granted under the provisions of said subdivision (c) said privileges and immunities.

The plaintiffs on behalf of themselves, as well as those persons, firms, associations and corporations who have to pay said charges, allege that said subdivision (c) of Section 77, as amended, of the "California Vehicle Act," and the acts of the defendant Snook, as Chief of the Division of Motor Vehicles, in enforcing said illegal subdivision (c), as aforesaid, are unconstitutional and void, being contrary to and in violation of the 14th Amendment of the Federal Constitution, as well as the provisions of the Constitution of the State of California, especially Sections 11 and 21 of Article 1, prohibiting the making or enforcement of any law which shall abridge the privileges or immunities of citizens, or which shall deprive any person of life, liberty or property without due process of law, or denies to any person the equal protection of the laws, or granting privileges or immunities to some of the same class of persons while denying the same privileges or immunities to others of the same class, and the protection of all of which the said plaintiffs and all said others pray.

[fol. 8]

V

The plaintiffs, as well as said others, are tax payers in said respective cities of the State, and are compelled to pay taxes and assessments in order to construct and repair the streets in said respective cities, but also as owners and operators of motor vehicles transporting persons for hire or transporting property are compelled to pay charges, as license fees, in said respective cities before they can use said streets. Said license fees vary from $5.00 to $250.00 per year according to the weight and capacity of the motor vehicle, depending upon the city. Said cities were empowered by the Constitution of the State of California to issue licenses in order to obtain money for the cost of regulating said motor vehicles and also for revenue. The plaintiffs and said others will be compelled to pay in the future said license fees on their additional trucks, as aforesaid, or their business will be irreparably damaged, and they have paid said fees on their motor vehicles which have been operated prior to this time.

The plaintiffs and said others have this year paid several millions of dollars to said respective cities for said license fees, and about 75% of the money so collected is used for reconstruction or repair on the streets of the respective cities and the other 25% is used for regulation.

The plaintiffs allege that 75% of the operation of their motor vehicles is confined exclusively to the streets of said respective cities and the other 25% is on the highways outside of the limits of said cities.

Under the provisions of said "California Vehicle Act" all of the money collected by the defendant Snook from said subdivision (c) is used exclusively in the reconstruction [fol. 9] maintenance or repair on the State Highways or in the construction or maintenance of county roads, and no portion of said money is used to construct, reconstruct, repair or maintain the streets of said respective cities.

The plaintffs allege said charges under said subdivision (c) are not designed, as the measure of the cost or value of the use of highways outside of the limits of said cities, as the motor vehicles operating continually on said highways for the same flat charges.

The plaintiffs and all others allege that said subdivision (c) and the acts of the defendant Snook in enforcing said illegal subdivision (c) are unconstitutional and void, being contrary to and in violation of the 14th Amendment of the Federal Constitution, as well as the Constitution of the State of California, prohibiting the making or enforcement of any law which allowed double taxation or granting privileges and immunities to some in the same class, or deprice any person of life, liberty or property without due process of law, or denies to any person the equal protection of the laws, the protection of all of which, the said plaintiffs and all said others pray.

VI

The plaintiffs allege that since December 31, 1928, the said Frank G. Snook, defendant, acting solely and by virtue of his said color of office, to-wit, Chief of the Division of Motor Vehicles, has enforced the said provisions of subdivision (c), and has illegally demanded and collected the said illegal and unconstitutional exactions from the said plaintiffs and all other persons, firms, associations, and corporations similarly interested or situated; the plaintiffs and all said others were compelled to and paid said exact-[fol. 10] ions in order to use their motor vehicles, as aforesaid, or escape the heavy penalties, imposed by fines or imprisonments, or both, as well as the seizure of their motor vehicles. The plaintiffs requested the *plaintiff* Snook to inform them of what amount of money had been so collected from said subdivision (c) and he has failed to furnish such information, and the plaintiffs have been informed and believe the fact to be and upon such information and belief allege that said defendant Snook has collected more than $2,500,000 from said exactions of said subdivision (c), including the payment by said plaintiffs, as aforesaid, and said defendant Snook, unless restrained, will compel the plaintiffs and all said others after this day to pay more than $100,000 additional under the provisions of said subdivision (c). That said defendant Snook has already collected about $8,000,000 since December 31st, 1928 from the provisions of Section 77, as amended, as aforesaid, and

from the fees collected from manufacturers and owners and chauffeurs, and said $8,000,000 was collected about in this proportion, $5,200,000 from subdivision (a), $20,000 from subdivision (b), $2,500,000 from subdivision (c) and the balance $280,000 from manufacturers and owners and chauffeurs. That during this year the defendant Snook will collect more than $2,000,000 additional. That by the provisions of said "California Vehicle Act" only 25% of the amount so collected, as aforesaid, can be used for the regulation and enforcement of said Act, and the amount collected from said subdivisions (a), as aforesaid, will be more than twice the said cost of regulation and enforcement, and no portion of the money collected from subdivision (c), as aforesaid, will be used for said regulations and enforcement, but all said moneys will be used for reconstruction, [fol. 11] construction, maintenance and repair on the highways without the limit of the cities. The plaintiffs allege further that such exactions found in said subdivision (c), as aforesaid, are compensation, for the use of said highways outside of the limits of cities, to-wit, tolls and are not based upon the police power, but for revenue. The plaintiffs allege further that said flat charges, as aforesaid, to be paid in advance before the use of the highways and the streets of said cities, are unconstitutional, as such charges cannot be divided in advance, depending upon the future operations on the said highways in comparison with the said operation on the streets in said cities.

The said subdivision (c), as aforesaid, and the acts of said defendant Snook in enforcing said illegal subdivision (c) are unconstitutional and void, being contrary to and in violation of the 14th Amendment of the Federal Constitution and the Constitution of the State of California, prohibiting the making or enforcement of any law which shall abridge the privileges or immunities of citizens, or deprive any person of life, liberty, or property without due process of law, denies to any person the equal protection of the laws, the protection of all of which the said plaintiffs and all of said others pray.

VII

That the Congress of the United States on July 11th, 1916, enacted an Act entitled:

"An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes." Chap. 241, 39 Stat. at L. 355.

The State of California enacted a law, assenting to and agreeing to abide with the provisions of said Rural Post Roads Act, entitled:

[fol. 12] "An Act expressing assent of the State of California to the provisions of the Act of Congress approved July 11, 1916, entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes. Chap. 29, Laws of 1917.

Thereafter on November 9, 1921 Congress amended and supplemented said Act by the "Federal Highway Act," Chap. 119, 42 Stat. at L. 212.

That the Federal Government has since the year 1917 paid over to said State many millions of dollars under said Federal Acts for the construction or reconstruction of highways and in the future said Federal Government will pay additional millions to said State. That said Federal aid has been expended on all State highways and on all county roads for construction or reconstruction. All State highways and all county roads are rural post roads and also come within the provisions of said Federal Acts; one of said provisions provided:

"That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds."

The plaintiffs allege that the exactions under subdivision (c), aforesaid, are "tolls," being charges for the use of said highways outside of the limits of cities, and no portion of such money so collected thereunder is used for the cost of regulation or enforcement of said "California Vehicle Act," and moreover no portion thereof is used for the construction, reconstruction, maintenance or repair of any street in said cities, as the streets of said cities are constructed, reconstructed, maintained and repaired by taxation, assessments or license fees to be paid by these plaintiffs and all said others, as aforesaid, for the use of said streets by their motor vehicles.

The plaintiffs allege that said illegal subdivision (c), as [fol. 13] aforesaid, and the acts of the defendant Snook in enforcing said illegal subdivision (c), as aforesaid, are unconstitutional and void, being contrary to and in violation of the said Federal Aid Legislation, so adopted by the State of California, the protection of all of which the plaintiffs and all of said others pray.

VIII

The plaintiffs allege that in the provisions of Section 77, as amended, of the "California Vehicle Act," the said defendant Snook must pay the money so collected to the State Treasurer, and no portion of said moneys so deposited can be withdrawn, unless the defendant Riley should issue warrants, and said defendant Riley can only issue warrants in February and August, and the plaintiffs have been informed and believe and upon such information and belief charge the fact that the whole amount so collected by the defendant Snook from the proceeds of said subdivision (c), as aforesaid, is still in the "Motor Vehicle Fund" and unless this Honorable Court shall issue the interlocutory injunction prayed for herein restraining said defendant Riley, as aforesaid, said defendant Riley will draw warrants in August, 1929, on said "motor vehicle fund" and thereupon said money so collected, as aforesaid, from said subdivision (c), as aforesaid, will be distributed, and in the event said subdivision (c), as aforesaid, and the acts of said defendant Snook in collecting said money will be declared unconstitutional and void by this Honorable Court, then such money will be lost to these plainitffs and all of said others, and they will be irreparably damaged.

IX

The premises considered these plaintiffs and all persons, [fol. 14] firms, associations and corporations similarly interested or situated have no plain adequate and complete remedy at law.

X

That the matters involved in this controversy exceed in value the sum of Three Thousand (3,000) Dollars, exclusive of interest and costs.

XI

Forasmuch as these plaintiffs and all persons, firms, associations and corporations similarly interested or situated can have no adequate relief except in Court and to the end that the defendants may, if they can, show why the plaintiffs and all persons, firms, associations and corporations similarly interested should have the relief herein prayed, and make full disclosure and discovery of all the matters aforesaid according to the best and utmost of their knowledge and belief, full, true, direct and perfect answer make to the matters in this Bill of Complaint hereinabove stated, but not under oath being especially waived, the plaintiffs on behalf of themselves, as well as on behalf of all persons, firms, associations and corporations similarly interested or situated, who are entitled to the benefits herein, pray that and interlocutory injunction be granted restraining and enjoining the defendant, Frank G. Snook, as Chief of Motor Vehicle Division, as aforesaid, from in any way or manner enforcing or threatening to enforce the said provisions of said subdivision (c) of said section 77, as amended, of the "California Vehicle Act" and further restraining and enjoining said defendant, Ray L. Riley, as State Controller of the State of California, from issuing any warrant or warrants against said "Motor Vehicle Fund" which would deplete that fund to such an extent that less than $2,500,000.00 remained therein which [fol. 15] latter sum shall be subject to any order or orders of this Honorable Court in the premises, and the plaintiffs pray that this Court proceed to call in two other judges, one of whom to be a circuit judge, for the purpose of hearing and determining the application for said interlocutoy injunction as prayed for herein under the provisions of Section 266, as amended, of the Judicial Coade, and the plaintiffs pray upon the final hearing of this cause before said Court consisting of three judges for a decree declaring the said sub-division (c) of Section 77, as amended, of the "California Vehicle Act," being Chapter 266, Statutes of 1923, as amended by Chapter 844, Statutes of 1927 is unconstitutional and the said defendant, Frank G. Snook, as Chief of Division of Motor Vehicles, be forever enjoined and permanently restrained from en-

forcing the illegal, void and unconstitutional subdivision (c) of said Sec. 77, as amended, as aforesaid, and the plaintiffs further pray that a decree be entered commanding and directing the said defendant, Snook, to immediately account for all moneys which he has collected from said illegal subdivision (c) of Section 77, as amended, as aforesaid, and after said amount is found, then the defendant, Riley, is commanded and directed to immediately issue a warrant for the said amount so found, including interest, on said motor vehicle fund and said money shall be paid over *the* the registry of this Court, and in the event said amount so found is more than in said Motor Vehicle Fund, then a judgment for the difference is to be entered against said defendant, Snook, with interest, and the plaintiffs pray for such allowances, distributions and payments as the Court may hereafter determine, award and decree, and for all other, proper and further relief as may be just [fol. 16] and equitable in the premises, and for the costs and disbursements herein expended.

W. R. Crawford, J. F. Vizzard, Solicitors for Plaintiffs.

Duly sworn to by M. H. Robbins. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR AN INTERLOCUTORY INJUNCTION—Filed June 15, 1929

Come now the Plaintiffs in the above entitled cause and move this Court for an order to show cause why the Plaintiffs are not entitled to the issuance of an Interlocutory Injunction until the final determination of said cause; and the Plaintiffs request this Court will call in two other judges, one of whom shall be a Circuit Judge, under the provisions of Section 266, as amended, of the Judicial Code, so as to

hear and determine said motion for an interlocutory injunction, as the constitutionality of the provisions of a Statute of the State of California, and the acts of the said Defendant, Frank G. Snook, as Chief of the Division of Motor Vehicles, and the said defendant Ray L. Riley, as State Controller of the State of California, in enforcing said provisions of said State Statute are involved in this action, and further, that said Court, consisting of three Judges, shall finally hear and determine such action.

Said motion is based upon the records and files in the [fol. 18] cause.

W. R. Crawford, J. F. Vizzard, Solicitors of Plaintiffs.

[File endorsement omitted.]

[fol. 19] In United States District Court

[Title omitted]

Order to Show Cause—Filed June 15, 1929

It appearing to the Court from the motion for an interlocutory injunction and the affidavit attached thereto, and also from the allegations and prayer contained in the bill of complaint filed herein that the constitutionality of a Statute of the State of California and the acts of the defendant, Frank G. Snook, as Chief of the Division of Motor Vehicles and the defendant Ray L. Riley, as State Controller of the State of California, in enforcing provisions of said Statute are involved in this action; the plaintiffs have prayed for an interlocutory injunction restraining the enforcement of said provisions of said State Statute and the acts of the said Defendants during the pendency of this action, and until the final hearing and determination thereof; and it further appearing that the plaintiffs have moved the Court for said interlocutory injunction based upon the records and files in this cause, the Court being fully advised in the premises, it is

Considered, ordered, adjudged and decreed that the said [fols. 20-22] defendant Frank G. Snook, as Chief of the Division of Motor Vehicles, and said defendant Ray L.

Riley, as State Controller of the State of California, show cause, if any they have, before a session of this Court, consisting of three judges thereof, one being a Circuit Judge, at 2 o'clock P. M. on the 24th day of June, 1929, at the Court Room of this Court in the Federal Building in the City of San Francisco, California, why an interlocutory injunction should not issue as prayed for in the complaint and moved for by the plaintiffs; and further, the said plaintiffs shall forthwith serve copies of the Bill of Complaint, the motion for an interlocutory injunction, the order entered herein, and a proper Notice upon the Governor of the State of California, the Attorney General of the State of California, and the said Defendant, Frank G. Snook, as Chief of the Division of Motor Vehicles, and said defendant Ray L. Riley, as State Controller of the State of California.

Enter.

A. F. St. Sure, Judge.

Dated 15th day of June, 1929.

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT—Filed June 24, 1929

Now comes Frank G. Snook as Chief of the Division of Motor Vehicles, State of California, and Ray L. Riley, as State Controller of the State of California, named as defendants in the above entitled proceeding, and they move the above entitled court to dismiss the Bill of Complaint filed herein on the following grounds:

I

That said bill of complaint does not state facts sufficient to constitute a cause of action against said defendants or either of them, or to entitle the plaintiffs, or any of them, to the whole or any part of the relief prayed for in said complaint.

II

That this court has no jurisdiction of the subject of this [fol. 24] proceeding or of the above named defendants or either of them.

III

That there is a misjoinder of parties plaintiff in the above entitled action.

IV

That there is a misjoinder of parties defendant in the above entitled action.

V

That there is a misjoinder of causes of action set forth in plaintiffs' complaint, in that several causes of action are attempted to be set forth improperly in said complaint, being the cause of action against the defendant Snook for an injunction restraining him from enforcing the provisions of an act of the legislature of the State of California; an action for an accounting and a judgment for the return of moneys heretofore paid by the plaintiffs as fees to the State of California; an action for misjoinder against the State Controller from issuing any warrants against the motor vehicle fund, and an action for a writ of mandate against the State Controller commanding and directing him to issue a warrant to the plaintiffs for the amounts heretofore paid by them as license fees under the statute in question, and an action against the defendant Snook for a money judgment for such fees.

VI

That several causes of action have been attempted to be set forth in plaintiffs' complaint but they have not been separately stated.

[fol. 25]

VII

That said plaintiffs have not, nor have either or any of them, legal capacity to sue the defendants, or either of them.

Said motion is made and based upon all of the pleadings on file in this action, this motion, notice thereof and proof of service.

Dated San Francisco, California, June 24th, 1929.

U. S. Webb, Attorney General of the State of California; Robert W. Harrison, Chief Deputy Attorney General; Frank L. Guerena, Deputy Attorney General; Attorneys for said Defendants.

[fol. 26] IN UNITED STATES DISTRICT COURT

Present: the Honorable Frank H. Rudkin, Circuit Judge; A. F. St. Sure, District Judge, and Harold Louderback, District Judge.

No. 2389-S

GEO. T. COTTINGHAM and WILLIAM C. MEGGINES, Doing Business as City Transfer Company; San Jose Transfer & Storage Company, a Corporation, and Union Ice Company, a Corporation, Plaintiffs,

vs.

FRANK G. SNOOK, as Chief of the Division of Motor Vehicles, State of California, and Ray L. Riley, as State Controller of the State of California. Defendants

DECREE—Filed June 26, 1929

This cause came on to be heard Monday, June 24, 1929 and on motion for interlocutory injunction and motion to dismiss the bill and was argued by counsel and submitted; and now, being fully considered,

It is ordered, adjudged and decreed that the motion for injunction be, and it is, denied; and motion to dismiss bill granted and the cause dismissed.

June 25, 1929.

Frank H. Rudkin, Circuit Judge. A. F. St. Sure, District Judge. Harold Louderback, District Judge.

[fol. 27] [File endorsement omitted.]

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed July 1, 1929

The above named Plaintiffs, conceiving themselves aggrieved by the order and decree made and entered on the

26th day of June, 1929, in the above entitled action, do hereby appeal from the said order and decree to the Supreme Court of the United States, for the reasons specified in the Assignment of Error, which is filed herewith, and pray that this appeal may be allowed and a transcript of the records, proceedings, motions, orders, decrees and all papers in said action, duly authenticated, may be sent to the Supreme Court of the United States at Washington, D. C.

Dated this 1st day of July, 1929.

W. R. Crawford, J. F. Vizzard, Solicitors for Plaintiffs.

The foregoing appeal is allowed upon the filing of a proper bond in the amount of two hundred fifty ($250) dollars.

A. F. St. Sure.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed July 1, 1929

And now, on this 1st day of July, 1929, came the plaintiffs by their solicitors W. R. Crawford and J. F. Vizzard and say that the order entered in the above cause on the 26th day of June, 1929, denying the application for an interlocutory injunction against the defendants herein, is erroneous and unjust to plaintiffs:

Because the Court erred in refusing and denying the application by plaintiffs for an interlocutory injunction against Frank G. Snook, as Chief of Division of Motor Vehicles and Ray L. Riley, as State Controller of the State of California, defendants herein.

And further, and now, on this 1st day of July, 1929 came the plaintiffs by their solicitors, W. R. Crawford and J. F. Vizzard and say that the order entered in the above cause on the 26th day of June, 1929, granting the motion to dismiss the complaint in such cause and dismissing the said complaint, is erroneous and unjust to the plaintiffs:

Because the court erred in granting the said motion to dismiss the said complaint, and,

Because the Court erred in dismissing the said complaint.

[fols. 30-36] And further, and now, on this 1st day of July, 1929, came the plaintiffs by their solicitors W. R. Crawford and J. F. Vizzard and say that the decree entered in the above cause on the 26th day June, 1929, granting said motion to dismiss and dismissed the cause, is erroneous and unjust to plaintiff:

Because the court erred in dismissing the cause.

Wherefore the plaintiffs pray that the said order refusing and denying the said interlocutory injunction be reversed, and further that the said decree entered in such cause granting the motion to dismiss and dismissing the cause be reversed, and the District Court be instructed to enter proper order or decree granting said interlocutory injunction prayed for in the bill of complaint and further that the District Court be instructed to enter the decree as prayed for by said Bill of Complaint, or for such proper relief as the plaintiffs are entitled to and as the nature of the cause demands.

W. R. Crawford, J. F. Vizzard, Solicitors for Plaintiffs.

[fols. 37 & 38] Citation in usual form, showing service on U. S. Webb and Robert W. Harrison, filed July 2, 1929, omitted in printing.

[fol. 39] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF RECORD TO BE PRINTED—Filed Aug. 3, 1929

Statement

I

That the Statutory Court erred in denying the motion for the interlocutory injunction.

II

That the Statutory Court erred in granting the motion to dismiss the Bill of Complaint.

III

That the Statutory Court erred in dismissing the bill of complaint.

IV

That the Statutory Court erred in dismissing the cause of action.

V

This action is a class suit and was instituted in the Federal District Court; and said Court has jurisdiction to hear [fol. 40] and determine the matter involved in this controversy.

VI

The appellants and many thousands of persons, firms, associations and corporations have been compelled to pay said exactions under the said subdivision (c) of the said Section 77, as amended in the year of 1927, of said "California Vehicle Act," in order to use not only the Federal Aid Highways, but also the streets within the limits of said cities, and now they are compelled to pay to said Appellee Snook said exactions before they can use said highways and streets, as aforesaid, by their additional motor vehicles. The said Appellants and said others are entitled to the protection of the 14th Amendment of the Federal Constitution, and the Constitution of the State of California or their businesses will be irreparably damaged.

VII

Under the provisions of the State Constitution, as well as Legislative Acts, the cities are empowered to charge license and other fees of all motor vehicles operating in said cities transporting persons for hire or transporting property before said motor vehicles can use said streets. All the cities in said State had many years prior to the first Motor Vehicle Act of 1913 enacted ordinances for the cost of regulation and as compensation for the wear and tear of said streets by motor vehicles transporting persons for hire and also transporting property. Said cities are now collecting from said Appellants and all said others many millions of dollars annually, 25% of said money is

used for regulation and the balance, 75%, is expended in the maintenance and repair of their said streets. The said exactions are "tolls," and in addition to said exactions the [fol. 41] Appellants and all said others, as taxpayers, pay taxes and assessments to construct the said streets, and to maintain and repair the same.

VIII

Under the provisions of the "California Vehicle Act" said subdivision (c) of Section 77, as amended in the year 1927, was not enacted under police power, but as a revenue measure in order to compel the Appellants and certain of said others to pay said exactions in advance before they could use not only the Federal Aided Highways, but also the streets within the limits of said cities. All the money so collected has been and now is being expended exclusively for the construction, maintenance and repair of the Federal Aided Highways, although 75% of said money so collected was charged for the use of said streets. Said exactions under said subdivisions (c), as aforesaid, are "tolls."

IX

It is admitted that thousands of motor vehicles transporting persons for hire or transporting property using both the Federal Aided Highways and said streets of said cities are not required to pay said exactions under said subdivision (c), as aforesaid, as their motor vehicles do weigh, unladen, less than 3000 pounds, even though the weight of vehicle and load would exceed 6000 pounds; and said Appellants and all persons, firms, associations and corporations similarly interested and situated have been and will be in direct competition in their businesses with the owners and operators so vested with said privileges, as aforesaid, and said Appellants and said others have been irreparably damaged by such competition, and they will suffer said irreparable damage daily in their businesses. Said subdivision (c), of said Section 77, as amended, as aforesaid, is unconstitutional, being contrary to and in [fol. 42] violation of the due process of law and equal protection clauses of the 14th Amendment of the Federal Constitution, as well as the State Constitution.

X

It is admitted that the said cities have compelled owners and operators to pay in advance said exactions for the use of said streets before their motor vehicles can transport persons for hire or property. 75% of the money so collected is expended in the maintenance and repair of said streets. It is admitted that the appellants and said others similarly interested or situated have been and will be compelled to pay in advance said exactions under said subdivision (c), as aforesaid, before they can use not only the Federal Aid Highways, being all public highways outside of the limits of cities, but also the said streets in said cities before they can use their motor vehicles for the transportation of persons for hire or for the transportation of property; and 75% of the money so collected by said Appellee Snook is derived from said exactions for the use of said streets of said cities, as aforesaid; and every dollar so collected, as aforesaid, is expended on the construction of Federal Aided Highways and their maintenance and repair; and said Appellants and said others have never received any benefits from said exactions, as aforesaid. The said exactions, payable in advance, cannot be divided. Said subdivision (c), as aforesaid, is unconstitutional, as said exactions are arbitrary and unreasonable and impose double taxation being contrary to and in violation of the said 14th Amendment, especially the due process of law and the equal protection clauses thereof, as well as the Constitution of the State of California.

XI

[fol. 43] The State entered into a contract with the Federal Government by the terms of which said State agreed to abide by all the provisions of the Federal Highway Legislation. Said Appellants and said others are taxpayers, owners and operators of motor vehicles and have paid for years their taxes and licenses to the Federal Government, and are entitled to receive all the privileges and benefits of said contract.

XII

The said Federal Aid Legislation, so adopted by the State, provides "That all highways constructed or recon-

structed under the provisions of this Act shall be free from tolls of all kinds." Said subdivision (c) of said Section 77, as amended, of the "California Motor Vehicle Act," is unconstitutional, being contrary to and in violation of said contract entered into by said State, and the provisions of said Federal Aid Legislation, because said exactions, as aforesaid, are "tolls," and all highways in the State outside the limits of Cities are protected against the charge of "tolls," and further said exactions, as aforesaid, are collected in advance and cannot be divided.

XIII

The said Acts and threatened Acts of said Appellee Snook in enforcing the provisions of said subdivision (a), as aforesaid, are unconstitutional and void, as said subdivision (c), as aforesaid, is unconstitutional.

XIV

The Acts and threatened Acts of said Appellee Riley, in enforcing the provisions of said "California Vehicle Act" by distributing the money so collected by said Appellee Snook, have been and will be unconstitutional and void, as said subdivision (c), as aforesaid, is unconstitutional; and said Appellants and said others have been and will in the future be irreparably damaged and their businesses dam- [fol. 44] aged without any recourse.

XV

The Appellants contend that they and all persons, firms, associations and corporations similarly interested or situated are entitled to all of the relief prayed for in the bill of complaint against said Appellees Snook and Riley, and for all other and proper relief as this Honorable Court may deem proper and fit in the premises.

Parts of Record to be Printed

1. Bill of Complaint.

2. Motion for interlocutory injunction.

3. Order setting down for hearing said motion.

4. The motion to dismiss the bill of complaint.

5. The order or decree denying the motion for interlocutory injunction, granting the motion to dismiss and dismissing the cause of action.

6. Assignments of Error.

7. Petition for Appeal and order allowing same.

8. Citation.

9. Names of solicitors and addresses: W. R. Crawford, 310 Call Building, San Francisco; J. F. Vizzard, 310 Call Building, San Francisco; Henry G. Hotchkiss, 20 Pine Street, New York City.

[fol. 45] W. S. Crawford, J. F. Vizzard, Henry G. Hotchkiss, Solicitors for Appellants.

Due service and receipt of a copy of the above points relied upon and designation of parts of Record to be printed is hereby admitted this 29th day of July, 1929.

U. S. Webb, Attorney General; R. W. Harrison, Deputy Attorney General, Solicitors for Appellees.

[fol. 46] [File endorsement omitted.]

Endorsed on cover: File No. 34,398. N. California D. C. U. S. Term No. 267. Geo. T. Cottingham and William C. Meginnes, doing business as City Transfer Company, et al., appellants, vs. Frank G. Snook, as Chief of Division of Motor Vehicles of the State of California, and Ray L. Riley, as State Controller of the State of California. Filed July 29, 1929. File No. 34,398.

FILE COPY

FILED
OCT 4 1929
CHARLES ELMORE CROPL
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1929

No. 267

GEO. T. COTTINGHAM and WILLIAM C. MEGINNIS, doing business as City Transfer Company, et al.,

Appellants,

vs.

FRANK G. SNOOK, as Chief of the Division of Motor Vehicles, State of California, et al.,

Appellees,

MOTION FOR CONSOLIDATION AND HEARING.

W. R. CRAWFORD,
J. F. VIZZARD,
Call Building, San Francisco, California.
HENRY G. HOTCHKISS,
L. C. Smith Building, Seattle, Washington.
Solicitors for Appellants.

...AD-WALSH PRINTING CO., SAN FRANCISCO

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. 267

GEO. T. COTTINGHAM and WILLIAM C. MEGINNIS, doing business as City Transfer Company, et al.,
Appellants,

vs.

FRANK G. SNOOK, as Chief of the Division of Motor Vehicles, State of California, et al.,
Appellees,

MOTION FOR CONSOLIDATION AND HEARING.

The appellants in the above entitled cause show that there is now pending in this Court a case entitled *Carley & Hamilton, Inc., et al., v. Frank G. Snook,* as Chief of the Division of Motor Vehicles, being numbered No. 86, October term, 1929, under the provisions of Section 266 of the Judicial Code, as amended; the appellants are only using the streets of cities by

their motor vehicles, trailers and semi-trailers in transporting passengers for hire or property, and do not use any highway outside of the limits of said cities; the appellee under the color of his office threatens to and will enforce the provisions of the "California Vehicle Act," including subdivisions (b) and (c) of Section 77, as amended; the appellants claimed that said subdivisions (b) and (c) are unconstitutional and the acts of the appellee are void and illegal; the brief of the appellants has been served and filed.

In the instant case the appellants have perfected their appeal and expect to receive the printed transcript of record in the first part of October, 1929.

The appellants instituted this case under the provisions of Section 266 of the Judicial Code, as amended. The appellants are using the Federal Aided Highways and the streets of cities by their motor vehicles, trailers and semi-trailers in transporting property. The appellees under color of their offices have and will enforce the provisions of the "California Vehicle Act," including subdivision (c) of Section 77, as amended. The appellants claimed that said subdivision (c) is unconstitutional and the acts of the appellees are void and illegal.

In the case of *Carley & Hamilton v. Snook,* No. 86, the appellants were not the users of highways outside of the limits of cities, while these appellants use both the streets of cities and the Federal Aided Highways.

Wherefore, the appellants, as provided for under paragraph 8 of rule 20 of the Rules of the United

States Supreme Court, pray this Honorable Court to consolidate the above entitled cause with the case of *Carley & Hamilton, Inc., et al. v. Frank G. Snook,* as Chief of the Division of Motor Vehicles, No. 86 of October Term, 1929, and hear as one case; and that the appellants can adopt the brief of the appellants in said No. 86, as their own, and with permission to file an additional brief on the questions which were not within the issues in said case No. 86.

Dated, San Francisco,
September 28, 1929.

W. R. CRAWFORD,
J. F. VIZZARD,
HENRY G. HOTCHKISS,
Solicitors for Appellants.

Due service and receipt of a copy of the within is hereby admitted

this _____ *day of September, 1929.*

_____

Attorney General of the State of California,

_____

Deputy Attorney General of the State of California,
Solicitors for Appellees.

FILE COPY

AUG 26 192
CHARLES ELMORE C

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1929

No. 267

GEO. T. COTTINGHAM and WILLIAM C. MEGINNIS, doing business as City Transfer Company, et al.,

Appellants,

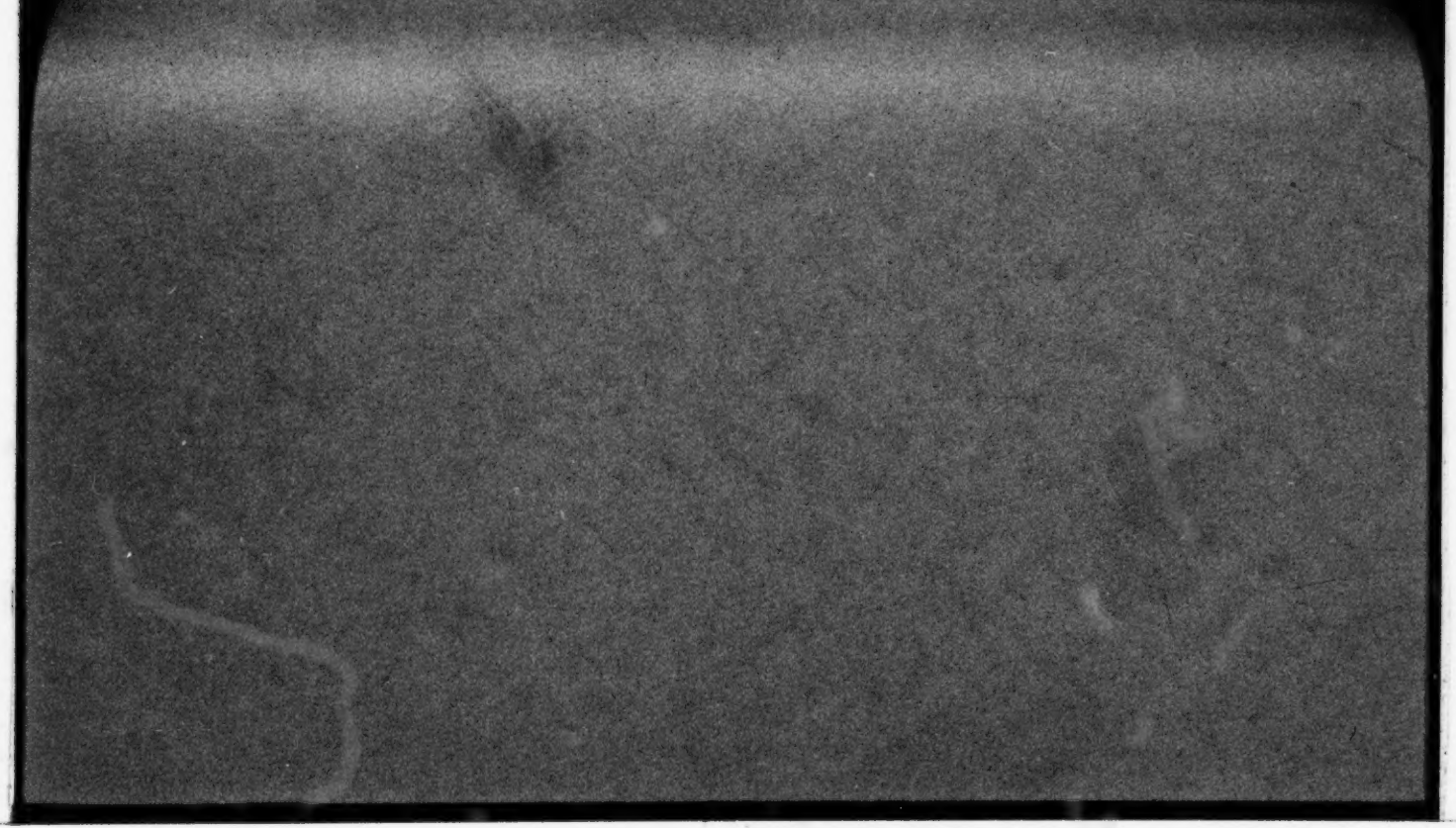
vs.

FRANK G. SNOOK, as Chief of the Division of Motor Vehicles, State of California, et al.,

Appellees.

STATEMENT.

W. R. CRAWFORD,
310 Call Building, San Francisco,
J. F. VIZZARD,
310 Call Building, San Francisco,
HENRY G. HOTCHKISS,
20 Pine Street, New York City,
Solicitors for Appellants.



In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. 267

GEO. T. COTTINGHAM and WILLIAM C. MEGINNIS, doing business as City Transfer Company, et al.,
Appellants,
vs.
FRANK G. SNOOK, as Chief of the Division of Motor Vehicles, State of California, et al.,
Appellees.

STATEMENT.

Come now the appellants in the above entitled cause and file their statement required by Rule 12 of the Supreme Court.

(a) The appeal herein is based upon the provisions of Paragraph 3 of Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. at L. 936, Chap. 229, U. S. C. title 28, Section 345.

(b) On June 26, 1929, the Statutory Court entered an order and decree denying the motion for an interlocutory injunction, granting the motion to dismiss the bill of complaint filed by the defendants, and also dismissing the cause of action. (Record, pp. 26, 27.) On July 1, 1929, the appellants filed and presented their prayer for appeal to said Statutory Court. (Record, p. 28.)

(c) Plaintiffs (now appellants) instituted this action in the United States District Court, Northern District of California. (Record, p. 1.) Plaintiffs have been and will in the future be compelled to pay the exactions under the subdivision (c) of Section 77, as amended, of the "Vehicle Act" of California, to the defendant Snook, in order to use, not only the highways outside of the limits of cities, but also the streets within said cities, with their motor vehicles in their respective businesses. Plaintiffs must put in service additional motor vehicles after July 1, 1929, in order to take care of their businesses or their businesses will be irreparably damaged or destroyed. (Record, pp. 1, 2, 3.) Defendant Snook (now appellee) is the Chief of the Division of Motor Vehicles, a State Officer, and defendant Riley (now appellee) is the State Controller, a State Officer. (Record, p. 3.)

State of California enacted the California Vehicle Act in 1923 and in 1927 amended said Act, especially subdivision (c) of Section 77 of said Act. Every owner or operator of a motor vehicle, trailer or semi-trailer must pay the exaction under subdivision (c) of said section before they can use said vehicles on

any public highway. The defendant Snook is not permitted to issue any registration on any said motor vehicles unless said owner has paid all of the charges in subdivisions (a) (b) and (c); it shall be unlawful for any motor vehicle to use any highway until all said exactions as aforesaid have been paid or the owner will be arrested and subject to fines or imprisonment or both, and also for the seizure of said motor vehicles. (Record, pp. 4, 5.) The legislative bodies of counties and cities are given the power to license all motor vehicles as aforesaid for revenue, as well as the cost of regulation. (Record, p. 5.) The defendant Snook must deposit daily the moneys, so collected from said Section 77, as aforesaid, into the State treasury to the credit of the motor vehicle fund. All amounts so collected and distributed must be expended exclusively in the construction and maintenance of public highways, outside of the limits of cities. (Record, pp. 5, 6.) The defendant Riley, as State Controller, is vested with the exclusive power to draw warrants upon said motor vehicle fund in the months of February and August. (Record, p. 6.) Prior to the said amendment of 1927, which went into force and effect in December, 1928, every motor vehicle was compelled to pay the charges named in the said subdivision (c), and the smallest charge was $10.00 for a vehicle weighing, unladen, less than 3000 pounds. The amendment has released any payments on vehicles weighing less than 3000 pounds no matter what the weight may be of load and vehicle. Under the said amendment the charges under subdivision

(c), as aforesaid, have been increased 250 per cent. There are many thousands of motor vehicles weighing less than 3000 pounds, unladen, but weigh more than 6000 pounds when laden transporting persons for hire and transporting property, and said owners of said vehicles pay no charges under said subdivision (c), as aforesaid, and said owners are in direct competition with the plaintiffs and all others similarly interested or situated, who must pay such exactions before they can use their motor vehicles not only on the streets of the cities, but also on the public highways outside of the said cities. The said defendant Snook has and will enforce said law. The plaintiffs and said others have been compelled to pay such charges as aforesaid. Said plaintiffs and said others have been damaged by said competition, as aforesaid, and are being damaged daily, and can never recover any of said losses from said owners who have been granted said privileges and immunities under the said provisions of said subdivision (c), as aforesaid. The plaintiffs allege that said subdivision (c), as aforesaid, and the acts of the defendant Snook, as Chief of the Division of Motor Vehicles, in enforcing said illegal subdivision (c), as aforesaid, are unconstitutional and void, being contrary to and in violation of the Fourteenth Amendment of the Federal Constitution, as well as the provisions of the Constitution of the State of California, prohibiting the making or enforcement of any law which shall abridge the privilege or immunities of citizens, or which shall deprive any person of life, liberty or property without due

process of law, or denies to any person the equal protection of the law, or granting privileges or immunities to some of the same class of persons while denying the same privileges or immunities to others of the same class, and the protection of all of which the plaintiffs and all said others pray. (Record, pp. 6, 7.)

The plaintiffs, as well as said others, are tax payers and are compelled to pay taxes and assessments in their respective cities to construct and repair the streets thereof, and the licenses for the use of motor vehicles on said streets transporting persons for hire or transporting property before they can use said streets. Said cities are empowered by the Constitution to regulate said streets and obtain revenue for such use as aforesaid. Said plaintiffs and all said others are required to pay said licenses before they can use their motor vehicles on said streets, and without such payments their businesses will be irreparably damaged and destroyed. Seventy-five per cent of the money collected is used for the reconstruction or repair of said streets, and the other 25 per cent is used for regulation. That 75 per cent of the operation of the plaintiffs and all said others is confined exclusively to the use of said streets and 25 per cent is on the highways outside of the limits of said cities. The monies collected under subdivision (c), as aforesaid, are expended exclusively in the reconstruction, maintenance and repair on State highways, or in the construction or maintenance of county roads, and no portion thereof is expended on the streets of said

cities. The plaintiffs allege that said charges under said subdivision (c), as aforesaid, are not designed as the measure of the cost or value of the use of highways outside of the limits of said cities, as said charges are the same no matter whether or not the motor vehicle operates continually on said highways. The said provisions of said subdivision (c), as aforesaid, and the acts of the said defendant Snook in enforcing said illegal charges are unconstitutional, being contrary to and in violation of the Fourteenth Amendment of the Federal Constitution, as well as the Constitution of the State of California, prohibiting the making or enforcement of any law which allowed double taxation, or granting privileges and immunities to some in the same class, or deprives any person of life, liberty or property without due process of law, or denies to any person the equal protection of the laws, all of which the said plaintiffs and said others pray for said protection. (Record, pp. 8, 9.)

Said defendant Snook, acting solely and by virtue of his said color of office, to-wit, Chief of the Division of Motor Vehicles, has enforced the said charges of said subdivision (c), as aforesaid, and has illegally demanded and collected the said charges against said plaintiffs and said all others; and said plaintiffs and all said others have been compelled to pay said exactions in order to use their motor vehicles, as aforesaid, or escape the heavy penalties imposed by fines or imprisonments or both, as well as the seizure of their motor vehicles. Said defendant Snook has already collected more than $2,500,000 from said subdivision

(c) at the time of the filing of this complaint; and that said defendant will collect more than $2,000,000 additional from said plaintiffs and said others during the remainder of the year 1929. No portion of said money collected under subdivision (c) will be used for the cost of regulation. That said exactions under said subdivision (c), as aforesaid, are compensation for the use of highways outside of the limits of cities, to-wit, "tolls," and are not based upon police power but for revenue. Said exactions are flat charges to be paid in advance before the use of the highways and said streets and are unconstitutional, as such charges cannot be divided. Said provisions of said subdivision (c), as aforesaid, and the acts of said defendant Snook in enforcing said illegal subdivision (c) are unconstitutional and void, being contrary to and in violation of the Fourteenth Amendment of the Federal Constitution, as well as the Constitution of the State of California, prohibiting the making or enforcement of any law which shall abridge the privileges or immunities of citizens or deprive any person of life, liberty or property without due process of law, and denies to any person the equal protection of the laws, the protection of all of which the plaintiffs and all said others pray. (Record, pp. 9, 10, 11.)

Congress enacted the Rural Post Act of 1916, and amended and supplemented the same by the "Federal Highway Act" of 1921. The State of California assented to the provisions of said Federal Acts and agreed to abide with the same. The Federal Government has performed all the acts required by it. All

State highways and all county roads have been constructed or reconstructed under the said Federal Acts, and said Federal aid has been expended for said purpose. That all the exactions under said subdivision (c), as aforesaid, are "tolls," and said charges are made for the use of said highways outside of the limits of cities, and no portion, so collected, is used for the cost of regulation or enforcement of said "California Vehicle Act," and no portion is expended on the construction, reconstruction, maintenance or repair of streets in said cities, as the plaintiffs and said others are taxed by said cities for such purposes by taxation, assessments and license fees.

That the provisions of said subdivision (c) and the acts of said defendant Snook in enforcing said illegal exactions are unconstitutional and void, being contrary to and in violation of the provisions of said Federal aid legislation prohibiting "tolls of all kinds," so adopted by the State, the protection of all of which the plaintiffs and all of said others pray. (Record, pp. 11, 12, 13.)

The said defendant Snook must pay the money so collected from said subdivision (c) to the State Treasurer, and no portion of the same can be withdrawn, unless said defendant Riley issue warrants on said fund, and he can only issue warrants in February and August. All of the said money so collected by said defendant Snook under the said subdivision (c), as amended, as aforesaid, is still in said "Motor Vehicle Fund." Unless restrained said defendant Riley will issue warrants in August, 1929, on said fund, and

such money will be distributed, and if the said exactions under said subdivision (c) and the acts of said defendant Snook will be declared unconstitutional and void, then such money will be lost to these plaintiffs and said others, and they will be irreparably damaged. (Record, p. 13.)

Plaintiffs and said others have no plain, adequate or complete remedy at law, and matters involved herein exceed in value the sum of $3000 exclusive of interest and costs. (Record, p. 14.)

The plaintiffs on behalf of themselves, as well as on behalf of all persons, firms, associations and corporations similarly interested or situated pray that an interlocutory injunction be granted restraining and enjoining the defendant Snook, as Chief of the Motor Vehicle Division, in any way or manner from enforcing or threatening to enforce the said provisions of said subdivision (c), as aforesaid, and further restraining and enjoining said defendant, Ray L. Riley, as State Controller, from issuing any warrant or warrants against said "Motor Vehicle Fund" which would deplete that fund to such an extent that less than $2,500,000 remain therein, which latter sum shall be subject to any order or orders of the Court; further, the Court shall proceed to call in two other judges, one of whom to be a circuit judge, for the purpose of hearing and determining the application of said interlocutory injunction as prayed under the provisions of Section 266, as amended, of the Judicial Code, and upon the final hearing before said Statutory Court for a decree declaring the said subdivision

(c), as aforesaid, is unconstitutional and the said defendant Snook be forever enjoined and permanently restrained from enforcing said illegal, void and unconstitutional subdivision (c), and for an accounting of the monies so collected from said illegal subdivision (c), as aforesaid, and said defendant Riley is commanded and directed to immediately issue a warrant for said amount, including interest, on said vehicle fund, and said money shall be paid in the registry of this Court, and in the event said amount so found is more in said "Motor Vehicle Fund," then a judgment for the said difference is to be entered against said defendant Snook, with interest, and for allowances, distributions and payments as the Court may hereafter determine, award and decree, and for all other proper relief, and for the costs and disbursements expended. (Record, pp. 14, 15, 16.)

Motion was presented for a hearing on the interlocutory injunction before a Statutory Court. (Record, pp. 17, 18.) Order was entered by the Court and a hearing was ordered before a Statutory Court. (Record, pp. 19, 20.) A proper notice was served upon the Governor, Attorney General and the two defendants. (Record, pp. 21, 22.) The defendants filed a motion to dismiss the bill of complaint. (Record, pp. 23, 24, 25.) The Statutory Court entered an order and decree refusing the motion for an interlocutory injunction, granting the motion to dismiss the bill of complaint and also dismissing the cause. (Record, pp. 26, 27.)

The plaintiffs filed and presented their assignments of error and prayer for appeal. The Statutory Court granted the prayer. (Record, pp. 28, 29, 30.) A proper appeal bond was filed. (Record, pp. 31, 32, 33.) A proper praecipe was served and filed. (Record, pp. 34, 35.) A proper citation was served and filed. (Record, pp. 37, 38.)

(d) The following cases sustained the jurisdiction:
Buck v. Kuykendall, 267 U. S. 308;
Morris, et al., v. Duby, et al., 274 U. S. 135.

Wherefore the appellants pray this Honorable Court to sustain its jurisdiction.

Dated, San Francisco,
August 19, 1929.

Respectfully submitted,
W. R. CRAWFORD,
J. F. VIZZARD,
HENRY G. HOTCHKISS,
Solicitors for Appellants.

Due service and receipt of a copy of the within is hereby admitted

this.....*day of August, 1929.*

.....

Attorney General,

.....

Deputy Attorney General,
Solicitors for Appellees.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

NOV 26 19
CHARLES ELMORE C
CL

No. 267

GEO. T. COTTINGHAM and WILLIAM C. MEGINNES, et al.,
Appellants,

vs.

FRANK G. SNOOK, et al.,
Appellees.

Consolidated for hearing as one case with No. 86

CARLEY & HAMILTON, INC., et al.,
Appellants,

vs.

FRANK G. SNOOK,
Appellee.

BRIEF FOR APPELLANTS IN No. 267.

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Subject Index.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. 267

GEO. T. COTTINGHAM and WILLIAM C. MEGINNES, et al.,
Appellants,

vs.

FRANK G. SNOOK, et al.,
Appellees.

Consolidated for hearing as one case with No. 86

CARLEY & HAMILTON, INC., et al.,
Appellants,

vs.

FRANK G. SNOOK,
Appellee.

BRIEF FOR APPELLANTS IN No. 267.

STATEMENT.

The plaintiffs (now appellants) instituted this case in the United States District Court of the Northern District

of California, Southern Division, on behalf of themselves and on behalf of all persons, firms, associations and corporations similarly interested or situated (R. 1). The plaintiffs, Cottingham and Meginnes and San Jose Transfer & Storage Company, Inc., have been and are now carrying on the business of transporting property on motor vehicles, trailers and semi-trailers using the highways outside of the limits of cities, as well as the streets of said cities; Cottingham and Meginnes have paid in advance this year $322.00 under subdivision (c) of Section 77 to the defendant Snook; their business amounts to more than $20,000 yearly. The plaintiff, San Jose Transfer & Storage Company, Inc., is in the business of transporting property in its motor vehicles using the highways outside of the City and using the streets of the City; its business amounts to more than $50,000 yearly; it has paid in advance this year $505.00 under said subdivision (c). The plaintiff, Union Ice Company, a corporation, is carrying on its business in many of the cities of California and transports many of its products by motor vehicle using the streets of many cities and also the highways outside of said cities; its business amounts to more than $1,000,000 yearly; it has paid in advance this year more than $15,000 under said subdivision (c). All of said plaintiffs will be compelled to pay additional charges under said subdivision (c) to the said Snook, as they are compelled to put into service additional motor vehicles, trailers, and semi-trailers in order to carry on their respective businesses, or they will be irreparably damaged and their respective businesses will be destroyed (R. 1, 2).

The defendant (now appellee) Frank G. Snook, as Chief of the Division of Motor Vehicles, is now and has been for some years last past in exclusive charge of the enforcement of the provisions of the "California Vehicle Act", including subdivision (c) of Section 77 thereof. The defendant (now appellee) Ray L. Riley has been for years and now is the State Controller of the State and is vested with exclusive power to issue warrants on the Motor Vehicle Fund as provided for in said "California Vehicle Act" (R. 2, 3).

The "California Vehicle Act", being Chapter 226, St. of 1923, as amended by Chap. 240, St. of 1925, and by Chap. 752, Chaps. 844 and 864, Stat. of 1927, provides, among other things, that no motor vehicle, trailer or semi-trailer can be used upon the highways until they have paid the exactions under subdivisions (a) and (b), or (a) and (c) of Section 77; the defendant Snook must receive the correct fees in advance, as aforesaid; any person operating said vehicles upon the public highways before he has paid the said fee shall be guilty of a misdemeanor; every person operating unlawfully is punished by a fine not to exceed $500.00 or imprisoned in the county jail for not to exceed six months, or by both fine and imprisonment, moreover said fee and penalty constitute a lien upon the vehicle and it is the duty of the defendant to collect said fee and penalty by seizure and sale of such vehicle; counties and cities are given the power to license for revenue and regulation vehicles transporting passengers for hire and transporting property; a Motor Vehicle Fund was created and all the collections from said subdi-

visions (a), (b) and (c) of said Section 77 are deposited in said Fund; not more than 25% so collected shall be expended for the enforcement of the provisions of the "California Vehicle Act"; the defendant Ray L. Riley has exclusive power to issue warrants on said Motor Vehicle Fund in the months of February and August; the net proceeds after the said expenses have been paid are divided equally between the State and the Counties (R. 3, 4, 5).

Prior to the said Amendments of 1927 said subdivision (c) provided as follows:

> "For each said vehicle weighing when unladen, less than 3000 pounds. ——————————$10.00;"

Said Amendments went into force and effect on December 31, 1928, and the charges from subdivision (c) were increased about 250%.

Since the 31st of December, 1928, there are many thousands of motor vehicles transporting persons for hire or transporting property which only weigh when unladen less than 3000 pounds, but carry more than 6000 pounds, and the owners and operators thereof pay no charges under the present subdivision (c); said owners and operators are in direct competition with these plaintiffs and all persons, firms, associations and corporations who have and will in the future pay said exactions, as aforesaid, before they can use their vehicles for the transportation of persons for hire or transporting property; said defendants will enforce said law; said competition has already caused the plaintiffs and all others, as aforesaid, at least $200,000

in damage to or loss of business, and said plaintiffs and said others are being damaged daily; the plaintiffs and said others will never recover any of the said losses from said others and operators who have been granted said privileges and immunities under the provisions of said subdivision (c) (R. 5, 6).

Said subdivision (c) of Section 77, as amended, of the "California Vehicle Act" and the acts of the defendant Snook in enforcing said illegal subdivision (c), as aforesaid, are unconstitutional and void, being contrary to and in violation of the due process of law and the equal protection clauses of the Fourteenth Amendment, as well as the provisions of the Constitution of the State of California, especially Sections 11 and 21 of Article I, as said subdivision and said acts of said Snook grant privileges and immunities to some of the same class of persons while denying the same privileges and immunities to others of the same class; the plaintiffs and all others similarly interested or situated pray the protection of said Fourteenth Amendment and the Constitution of the State of California (R. 1-13).

The plaintiffs, as well as said others, are taxpayers in their respective cities and are compelled to pay taxes and assessments to construct and repair the streets of said cities, and are also the owners and operators using motor vehicles transporting persons for hire or property on said streets and must pay license fees in said cities before using said streets; the license fees vary from $5.00 to $250.00 per year according to the weight and capacity of the motor vehicle, depending upon the city; said cities are

entitled under the Constitution of the State to issue licenses, in order to obtain money for the cost of regulating said motor vehicles and also for revenue; the plaintiffs and said others will be compelled to pay in the future said license fees on their additional trucks, or their business will be irreparably damaged and they have already paid said fees on their motor vehicles which have been operated prior to this time.

Said cities have collected several millions of dollars from said license fees, to-wit, "tolls", and about 75% of the money so collected is used for construction and repair on the streets and the other 25% is used for regulation.

That 75% of the operation of motor vehicles is confined exclusively to the said streets of cities and the other 25% is on highways outside of the limits of said cities (R. 7).

The money collected under said subdivision (c), as aforesaid, is used exclusively for the reconstruction, maintenance or repair on State highways or on County roads, and no portion of said money is used to construct, reconstruct, repair or maintain said streets.

The said exactions of the said subdivision (c), as aforesaid, are not designed, as a measure of cost or value of the use of highways outside of the limits of cities, as said motor vehicles operating continually on said highways and the streets of cities pay the same flat charges.

The plaintiffs and all others allege that said subdivision (c) and the acts of the defendant Snook in enforcing said illegal subdivision (c) are unconstitutional and void, being contrary to and in violaton of the 14th Amendment of the

Federal Constitution, as well as the Constitution of the State of California, prohibiting the making or enforcement of any law which allowed double taxation or granting privileges and immunities to some in the same class or deprive any person of life, liberty or property without due process of law, or denies to any person the equal protection of laws, the protection of all of which, the said plaintiffs and all said others pray (R. 7, 8).

The plaintiffs and said others have paid more than $2,500,000 to said defendant Snook since December, 1928, or said Snook would have enforced the provisions of said subdivision (c) and other provisions of said "California Vehicle Act"; said plaintiffs and said others would have been fined or imprisoned, or both, as well as having their motor vehicles seized and sold; unless restrained said Snook will compel said plaintiffs and said others after this date to pay more than $100,000 additional under the provisions of the said subdivision (c); said Snook has already collected since December, 1928, about $5,200,000 from subdivision (a), $20,000 from subdivision (b), and $2,500,000 from subdivision (c) and $280,000 from manufacturers, owners and chauffeurs; during this year the defendant Snook will collect $2,000,000 additonal; only 25% of the amount so collected, as aforesaid, may be used for the cost of the regulation and enforcement of said "California Vehicle Act"; the amount collected from said subdivision (a), as aforesaid, will be more than twice the said cost of regulation and enforcement; and no portion of the money collected from subdivision (c), as aforesaid, will be expended for regulation; said money will be used

for reconstruction, construction, maintenance and repair on the highways without the limits of cities; said exactions found in said subdivision (c), as aforesaid, are compensation for the use of said highways outside of the limits of cities, to-wit, "tolls"; and are not based upon the police power, but for revenue; said flat charges, as aforesaid, must be paid in advance before said motor vehicles operate on the highways and the streets of said cities, and such charges cannot be divided, depending upon the future operation on the said highways in comparison with the operation on the streets.

The said subdivision (c), as aforesaid, and the acts of said defendant Snook in enforcing said illegal subdivision (c) are unconstitutional and void, being contrary to and in violation of the 14th Amendment of the Federal Constitution and the Constitution of the State of California, prohibiting the making or enforcement of any law which shall abridge the privileges or immunities of citizens, or deprive any person of life, liberty, or property without due process of law, or denies to any person the equal protection of the laws, the protection of all of which the said plaintiffs and all of said others pray (R. 8, 9).

The Congress of the United States on July 11th, 1916, enacted an Act entitled:

"An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes." Chap. 241, 39 Stat. at L. 355.

The State of California enacted a law, assenting to and agreeing to abide with the provisions of said Rural Post Roads Act, entitled: "An Act expressing assent of the

State of California to the provisions of the Act of Congress approved July 11, 1916, entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes' ". Chap. 29, Laws of 1917.

Thereafter on November 9, 1921 Congress amended and supplemented said Act by the "Federal Highway Act", Chap. 119, 42 Stat. at L. 212.

That the Federal Government has since the year 1917 paid over to said State many millions of dollars under said Federal Acts for the construction and reconstruction of highways and in the future said Federal Government will pay additional millions to said State. That said Federal Aid has been expended on all State highways and on all county roads for construction or reconstruction. All State highways and all county roads are rural post roads and also come within the provisions of said Federal Acts; one of said provisions provided: "That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds."

The exactions under subdivision (c), as aforesaid, are "tolls", being charges for the use of said highways outside of the limits of cities, and no portion of such money so collected thereunder is used for the cost of regulation or enforcement of said "California Vehicle Act", and moreover no portion thereof is used for the construction, reconstruction, maintenance or repair of any street in said cities, as the streets of said cities are constructed, reconstructed, maintained and repaired by taxation, assessments or license fees to be paid by these plaintiffs, and all said

others, as aforesaid, for the use of said streets by their motor vehicles.

Said illegal subdivision (c), as aforesaid, and the acts of the defendant Snook in enforcing said illegal subdivision (c), as aforesaid, are unconstitutional and void, being contrary to and in violation of the said Federal Aid Legislation, so adopted by the State of California, the protection of all of which the plaintiffs and all of said others pray (R. 9, 10, 11).

The said defendant Snook must pay the money so collected to the State Treasurer, and no portion of said moneys so deposited in the "Motor Vehicle Fund" can be withdrawn, unless the defendant Riley should issue warrants, and said defendant Riley can only issue warrants in February and August; that the whole amount so collected by the defendant Snook from the proceeds of said subdivision (c), as aforesaid, is still in the "Motor Vehicle Fund", and unless this Honorable Court shall issue the interlocutory injunction prayed for herein restraining said defendant Riley, as aforesaid, said defendant Riley will draw warrants in August, 1929, on said "Motor Vehicle Fund", and thereupon said moneys so collected, as aforesaid, from said subdivision (c), as aforesaid, will be distributed, and in the event said subdivision (c), as aforesaid, and the acts of said defendant Snook in collecting said money will be declared unconstitutional and void by this Honorable Court, then such money will be lost to these plaintiffs and all of said others, and they will be irreparably damaged (R. 11).

The premises considered these plaintiffs and all persons, firms, associations and corporations similarly interested or situated have no plain, adequate and complete remedy at law (R. 11).

That the matters involved in this controversy exceed in value the sum of Three Thousand (3,000) Dollars, exclusive of interest and costs (R. 11).

The plaintiffs on behalf of themselves, as well as on behalf of all persons, firms, associations and corporations, similarly interested or situated pray that an interlocutory injunction be granted restraining and enjoining the defendant, Frank G. Snook, as Chief of Motor Vehicle Division, as aforesaid, from in any way or manner enforcing or threatening to enforce the said provisions of said subdivision (c) of said section 77, as amended, of the "California Vehicle Act", and further restraining and enjoining said defendant, Ray L. Riley, as State Controller of the State of California, from issuing any warrant or warrants against said "Motor Vehicle Fund" which would deplete that fund to such an extent that less than $2,500,000 remained therein which latter sum shall be subject to any order or orders of this Honorable Court in the premises; the plaintiffs pray that this Court proceed to call in two other judges, one of whom to be a Circuit Judge, for the purpose of hearing and determining the application for said interlocutory injunction as prayed for herein under the provisions of Section 266, as amended, of the Judicial Code; the plaintiffs pray upon the final hearing of this cause before said Court consisting of three judges for a decree declaring the said sub-division (c) of Section 77, as

amended, of the "California Vehicle Act", being Chapter 226, Statutes of 1923, as amended by Chapter 844, Statutes of 1927, is unconstitutional and the said defendant, Frank G. Snook, as Chief of Division of Motor Vehicles, be forever enjoined and permanently restrained from enforcing the illegal, void and unconstitutional subdivision (c) of said Sec. 77, as amended, as aforesaid; plaintiffs further pray that a decree be entered commanding and directing the said defendant, Snook, to immediately account for all moneys which he has collected from said illegal subdivision (c) of Section 77, as amended, as aforesaid, and after said amount is found, then the defendant, Riley, is commanded and directed to immediately issue a warrant for the said amount so found, including interest, on said motor vehicle fund and said money shall be paid over the registry of this Court, and in the event said amount so found is more than in said Motor Vehicle Fund, then a judgment for the difference is to be entered against said defendant, Snook, with interest; the plaintiffs pray for such allowances, distributions and payments as the Court may hereafter determine, award and decree, and for all other, proper and further relief as may be just and equitable in the premises, and for the costs and disbursements herein expended (R. 12, 13).

Order to show cause on said motion for an interlocutory injunction was filed on June 15th, 1929 (R. 13, 14, 15).

The defendants filed a motion to dismiss the Bill of Complaint on June 24th, 1929 (R. 15, 16).

On June 26th, 1929, the Statutory Court filed its decree denying the motion for an interlocutory injunction; and

granted the Motion to dismiss the Bill of Complaint and dismissed the cause (R. 17).

The plaintiffs appealed from said decree on July 1st, 1929 (R. 17, 18).

On the same date, July 21st, 1929, the Assignments of Error were filed (R. 18, 19).

Proper citation served and filed (R. 19).

The Statutory Court did not file any opinion, and at the hearing announced that this case has already been decided by its opinion and decree in the *Carley & Hamilton* case. The opinion is not reported and is found on pages 16, 17, 18 and 19 of the Record in the *Carley & Hamilton* case.

SPECIFICATION OF ERRORS.

I.

The Statutory Court erred in denying the application for an interlocutory injunction.

II.

The Statutory Court erred in granting the motion to dismiss the Bill of Complaint.

III.

The Statutory Court erred in dismissing the Bill of Complaint.

IV.

The Statutory Court err in dismissing the cause of action.

V.

The Statutory Court erred in deciding that subdivision (c) of Section 77 of the "California Vehicle Act", being Chapter 226, Statutes of 1923, as amended by Chapter 844, Statutes of 1927, is a police measure.

VI.

The Statutory Court erred in refusing to be bound by the meaning of said provisions of said subdivision (c), as aforesaid, as interpreted by the Supreme Court of California.

VII.

The Statutory Court erred in refusing to decide that the exactions under said subdivision (c), as aforesaid, were "tolls".

VIII.

The Statutory Court erred in deciding that said subdivision (c), as aforesaid, and the acts and the threatened acts of the defendants in enforcing said subdivision do not violate any provisions of the Constitution of the United States, but that the said subdivision and said acts are constitutional and legal.

IX.

The Statutory Court erred in refusing to decide that the appellants and many thousands of persons, firms, associations and corporations have been compelled to pay said exactions under the said subdivision (c) of the said Section 77, as amended in the year 1927, of said "California Vehicle Act", in order to use not only the Federal Aid Highways, but also the streets within the limits of

said cities, and now they are compelled to pay to said Appellee Snook said exactions before they can use said highways and streets, as aforesaid, by their additional motor vehicles, and are entitled to the protection of the 14th Amendment of the Federal Constitution, and the Constitution of the State of California, or their businesses will be irreparably damaged.

X.

The Statutory Court erred in refusing to decide that under the provisions of the State Constitution, as well as the state laws, the cities are empowered to charge license fees on all motor vehicles transporting persons for hire or transporting property before said motor vehicles can use said streets; said cities are now collecting from said appellants and all said others many millions of dollars annually, and 25% of said money is used for regulation and the balance, 75%, is expended in the maintenance and repair of their said streets; said exactions are "tolls"; in addition to said exactions the appellants and all said others, as taxpayers, pay taxes and assessments to construct the said streets, and to maintain and repair the same.

XI.

The Statutory Court erred in refusing to decide that under the provisions of the "California Vehicle Act" said subdivision (c) of Section 77, as amended in the year 1927, was not enacted under police power, but as a revenue measure in order to compel the appellants and certain of said others to pay said exactions in advance before they can operate their vehicles not only on the Federal Aided

Highways, but also on streets within the limits of said cities; all the money so collected has been and now is being expended exclusively for the construction, maintenance and repair of the Federal Aided Highways, even though 75% of said money so collected was a charge on said streets; said exactions under said subdivision (c), as aforesaid, are "tolls".

XII.

The Statutory Court erred in refusing to consider that many thousands of motor vehicles, transporting persons for hire or transporting property using both the Federal Aided Highways and said streets of said cities, are not required to pay said exactions under said subdivision (c), as aforesaid, as their motor vehicles weigh, unladen, less than 3000 pounds, even though the weight of vehicle and load would exceed 6000 pounds; said appellants and all persons, firms, associations and corporations similarly interested and situated have been and will be in direct competition in their businesses with the owners and operators so vested with said privileges, as aforesaid; said appellants and said others have been irreparably damaged by such competition, and they will suffer said irreparable damage daily in their businesses; said subdivision (c), of said Section 77, as amended, as aforesaid, is unconstitutional, being contrary to and in violation of the due process of law and equal protection clauses of the 14th Amendment of the Federal Constitution, as well as the State Constitution.

XIII.

The Statutory Court erred in refusing to consider that the appellants and said others similarly interested or situated have been and will be compelled to pay in advance said exactions under said subdivision (c), as aforesaid, before they can use their motor vehicles for the transportation of persons for hire or for the transportation of property; 75% of the money so collected by said appellee Snook is derived from said exactions for the use of said streets of said cities, as aforesaid; every dollar so collected, as aforesaid, is expended on the construction of Federal Aided Highways and their maintenance and repair; said exactions, payable in advance, cannot be divided; said subdivision (c), as aforesaid, is unconstitutional, as said exactions are arbitrary and unreasonable, and impose double taxation, being contrary to and in violation of the said 14th Amendment, especially the due process of law and the equal protection clause thereof, as well as the Constitution of the State of California.

XIV.

The Statutory Court erred in refusing to consider that the State entered into a contract with the Federal Government by the terms of which said State agreed to abide by all the provisions of the Federal Highway Legislation; said appellants and said others are taxpayers, owners and operators of motor vehicles and are entitled to receive all the privileges and benefits of said Federal legislation.

XV.

The Statutory Court erred in refusing to decide that said subdivision (c) of said Section 77, as amended, of the "California Vehicle Act", is unconstitutional, being contrary to and in violation of said contract entered into by said State, and the provisions of said Federal Aid Legislation, as said exactions, as aforesaid, are "tolls"; all highways in the State outside the limits of cities are protected against the charge of "tolls", and further said exactions, as aforesaid, are collected in advance and cannot be divided.

XVI.

The Statutory Court erred in refusing to decide that the said acts and threatened acts of said appellee Snook in enforcing the provisions of said subdivision (c), as aforesaid are unconstitutional and void, as said subdivision (c), as aforesaid, is unconstitutional.

XVII.

The Statutory Court erred in refusing to decide that the acts and threatened acts of said appellee Riley, in enforcing the provisions of said "California Vehicle Act" by distributing the money so collected by said appellee Snook, have been and will be unconstitutional and void, as said subdivision (c), as aforesaid, is unconstitutional.

XVIII.

The Statutory Court erred in refusing to decide that the appellants and all persons, firms, associations and corporations similarly interested or situated are entitled to

all of the relief prayed for in the bill of complaint against said appellees Snook and Riley.

ARGUMENT.

On October 28, 1929, this Honorable Court granted the motion to consolidate the case of *Cottingham, et al. v. Snook, et al.*, No. 267, October Term, 1929, with the case of *Carley & Hamilton, Inc., et al. v. Snook*, No. 86, for hearing as one case, and the appellants can adopt the brief of the appellants in said No. 86, as their own, and with permission to file an additional brief on the questions which were not within the issues in said case No. 86.

I.

THE APPELLANTS INSTITUTED THE ACTION ON BEHALF OF THEMSELVES AND ON BEHALF OF OTHERS SIMILARLY INTERESTED OR SITUATED. A CLASS SUIT.

The appellants in the instant case adopt the argument and citations in Paragraph I in the brief of the *Carley & Hamilton* case, p. 20, with the additional fact that the appellants operate on both the Federal aided highways and the streets of cities.

II.

THE CHARGES TO BE COLLECTED IN ADVANCE BY THE APPELLEE UNDER THE PROVISIONS OF SUBDIVISION (c) OF SECTION 77 OF THE "CALIFORNIA VEHICLE ACT", AS AMENDED, ARE "TOLLS".

The appellants in the instant case adopt the argument and citations in Paragraph II in the brief of the *Carley & Hamilton* case, p. 20.

III.

THE SAID SUBDIVISION (c) OF SAID SECTION 77 OF THE "CALIFORNIA VEHICLE ACT", AS AMENDED, IS A REVENUE MEASURE AND WAS NOT ENACTED AS A POLICE MEASURE.

The appellants in the instant case adopt the argument and citations in Paragraph III in the brief of the *Carley & Hamilton* case, p. 31.

IV.

ALL CITIES ARE EMPOWERED BY THE STATE CONSTITUTION AND HAVE ENACTED LICENSE ORDINANCES COMPELLING OWNERS OR OPERATORS OF MOTOR VEHICLES USED IN TRANSPORTING PASSENGERS FOR HIRE OR PROPERTY TO PAY IN ADVANCE LICENSE FEES BEFORE USING THE STREETS THEREOF. THE CHARGES ARE "TOLLS".

The appellants in the instant case adopt the argument and citations in Paragraph IV in the brief of the *Carley & Hamilton* case, p. 36.

V.

THE SAID SUBDIVISION (c) OF SECTION 77 OF SAID "CALIFORNIA VEHICLE ACT", AS AMENDED, COMPELLING THE APPELLANTS AND ALL PERSONS, FIRMS, ASSOCIATIONS AND CORPORATIONS SIMILARLY INTERESTED OR SITUATED TO PAY SAID CHARGES ARE UNCONSTITUTIONAL AND VOID, BEING CONTRARY TO AND IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

The appellants in the instant case adopt the argument and citations in Paragraph V in the brief, in the *Carley & Hamilton, Inc.* case, p. 38.

In the *Carley & Hamilton* case the plaintiffs (now appellants) were the owners and operators of motor vehicles transporting persons for hire or property exclusively on the streets of cities, while in the instant case the plaintiffs (now appellants) are the owners and operators of motor vehicles on the streets of the cities and also highways outside of said cities (R. 1, 2); 75% of the use of said motor vehicles is confined to the streets of cities, while 25% is confined to the highways outside of cities (R. 7); the money collected under said subdivision (c), as aforesaid, is used exclusively in the construction, reconstruction, maintenance or repair on the highways outside of cities, and no portion of said money is used to regulate, construct, reconstruct, maintain or repair the streets of cities; said exactions under said subdivision (c), as aforesaid, are not designed as the measure of the cost or value of the use of highways outside of the limits of said cities

(R. 5, 7); the appellants as well as said others, are tax payers in the respective cities and are compelled to pay taxes and assessments to construct and repair the said streets, and also to pay charges, to-wit, "tolls", as license fees, before they can use their motor vehicles; said cities are empowered to issue licenses in order to obtain money for the cost of regulation and for revenue; the appellants and said others have, and will pay annually many millions of dollars to said cities, as aforesaid, and 75% of the money so collected is used for reconstruction and repair on the streets and the other 25% is used for regulation (R. 7); prior to the amendments of 1927 every vehicle weighing when unladen less than 3000 pounds paid $10.00. Now the said appellants and said others pay 250% more; since December 31st, 1928, when such amendment went into effect, many thousands of motor vehicles are transporting passengers for hire or property weighing when unladen less than 3000 pounds, and the owners thereof pay no charges under the present subdivision (c), but are in direct competition with appellants and all said others, who have to and will in the future pay said charges before they can use their motor vehicles, or the defendant Snook will enforce said law by fines or imprisonment, or both, or by seizing their motor vehicles; said competition has already cost the appellants and said others at least $200,000 in damage to or loss of business, and every day said appellants and said others are being so damaged, as aforesaid, and they cannot recover any of said damages from said others, who have been granted under the provisions of said subdivision (c), as amended, said privileges and immunities (R. 5, 6, 8); the appellants were not able to

obtain any information from said Snook, at the time of the institution of this action, on June 15th, 1929, and they alleged that Snook has collected more than $2,500,000 from said exactions under subdivision (c), and that said plaintiffs and said others will pay more than $100,000 additional since said June 15th, 1929, and since December 31st, 1928, the defendant Snook has collected $8,000,000; that said $8,000,000 was collected about in this proportion: $5,200,000 from subdivision (a), $20,000.00 from subdivision (b), $2,500,000 from subdivision (c), and the balance, $280,000, from manufacturers and owners and chauffeurs, and defendant Snook will collect more than $2,000,000 additional; only 25% of the amount so collected can be used for the regulation and enforcement of said act and the amount collected from said subdivision (a), as aforesaid, will be more than twice the said cost of regulation and enforcement, and no portion of the money so collected from subdivision (c), as aforesaid, will be used for said regulations and enforcements, and all said moneys will be used on the highways without the limits of the cities; said exactions found in said subdivision (c), as aforesaid, are "tolls", and are not based upon police power but for revenue; said exactions, as aforesaid, to be paid in advance, cannot be divided, depending upon the future operations on said highways in comparison with the said operation on the streets in said cities (R. 8, 9).

As is seen, the appellants and all others similarly interested or situated use their motor vehicles about 75% on the streets of cities and 25% on the highways outside said cities. The appellants and all others are compelled to pay the exactions under said subdivision (c) even if

they only use their motor vehicles once or twice a year on the highway outside of the cities; they do not operate on any route and between fixed termini. It cannot be said that the flat tax under said subdivision (c) "could hardly have been designed as a measure of the cost or value of the use of the highways", as was said in the opinion delivered by Mr. Justice Brandeis, and "it follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise tax for the use of the streets of the city".

(See *Sprout v. South Bend*, p. 39, in Carley & Hamilton brief.)

We call attention to this court that said exactions could not be called occupation taxes (pp. 41, 42 in brief of Carley & Hamilton on this question and citations therein).

Subdivision (c) is as follows:

> "The following registration fees in addition to the registration fee specified in subdivision (a) of this section shall be paid for the registration of vehicles, including trailers and semi-trailers designed, used or maintained primarily for the transportation of passengers for hire or for the transportation of property, according to the following table;" (R. 4).

Every motor vehicle can be sold and the new owner is entitled to keep the old plates, as the original registration is transferred (Sec. 45). The Union Ice Company, an appellant, is not a common carrier, but is engaged in the business of manufacturing ice and operates its trucks in order to carry its products. It cannot be said that said exactions under subdivision (c) are occupation taxes, being the doing of any particular business.

(See the citations in *Sprout v. South Bend*, supra.)

We have been able to get some information from the appellee Snook of his records, since the bringing of this action in June, 1929. On August 9th, 1929, according to a communication to Mr. Vizzard, one of the solicitors, said Snook collected under color of subdivision (c) since December 31st, 1928 the following money, to-wit:

> "The amount collected from pneumatic tired trucks for the first six months of this year is $1,312,495.25; from solid tired trucks $1,468,539.50 and from trailers $308,686.90." (A total of $3,089,721.65.)

On October 22nd, 1929, Mr. Vizzard received the following information from appellee Snook:

> "In answer to your question as to the number of vehicles which were registered under the truck column last year and this year registered as automobiles, the number from January 1st to September 30th is 130,125 vehicles."

In other words these 130,125 vehicles paid weight fees under subdivision (c) in 1928, but pay no such fees whatsoever in 1929.

We have endeavored to receive information from appellee Snook as to the number of motor vehicles, trailers and semi-trailers registered under subdivision (c) in 1929. On November 9th, 1929, we were informed that he had no such information at this time, but we will receive it at some time in the future.

In the brief of Carley & Hamilton on p. 33, it is shown that appellee Snook collected from subdivisions (b) and (c) $2,668,000 during the year 1928 when all motor vehicles, trailers, and semi-trailers paid depending upon

their weights. Since December 31st, 1928, only about 150,000 motor vehicles, trailers and semi-trailers have paid in six months more than $3,000,000 under said subdivision (c), while 130,125 vehicles, trailers and semi-trailers do not pay a cent just because they weigh less than 3000 pounds unladen.

We submit that said subdivision, as aforesaid, is unconstitutional and the appellants and said others are entitled to the protection of the 14th Amendment prohibiting the making or enforcement of any law which shall abridge the privileges or immunities of citizens, or which deprive any person of life, liberty or property without due process of law, or denies to any person the equal protection of the law.

VI.

THE SAID PROVISIONS OF SAID SUBDIVISION (c) OF SAID SECTION 77 OF THE "CALIFORNIA VEHICLE ACT" ARE CONTRARY TO AND IN VIOLATION OF THE CONSTITUTION OF CALIFORNIA.

The appellants in the instant case adopt the argument and citations in Paragraph VI, in the brief of the *Carley & Hamilton* case, p. 51, together with the admitted facts found in Paragraph V of the brief herein.

VII.

THE MEANING OF THE TERM "FREE FROM TOLLS" HAS BEEN DETERMINED BY JUDICIAL DECISIONS AND ACTS OF CONGRESS BEFORE THE ENACTMENT OF THE RURAL POST ROAD ACT OF 1916.

We cite the following decisions of the Supreme Court and Acts of Congress which had fixed and determined the meaning of the term "Free from Tolls".

Congress granted public lands to the states in aiding the construction of railroads on the condition that such railroads were "Public highways for the use of the government, free from all tolls or other charge for transportation of its property or troops". The question presented to this court for consideration was whether or not such condition "free from all tolls or other charges for transportation of its property or troops" includes the free use of the road alone, or transportation also. Mr. Justice Bradley, in delivering the opinion of the court, said:

> "In view of the legislative history and the practice referred to, it seems impossible to resist the conclusion, when we meet with a legislative declaration to the effect that a particular railroad shall be a pubic highway, that the meaning is, that it shall be open to the use of the public with their own vehicles; and when Congress when granting lands in aid of such a road, declared that the same shall be and remain a public highway for the use of the Government of the United States, it only means that the Government shall have the right to use the road, but not that it shall have the right to require its transportation to be performed by the railroad company. And when this right of the use of the road is granted 'free from all toll or other charge for transportation of any property or troops',

it only means that the Government shall not be subject to any toll for such use of the road."

In the opinion, the court cites a number of Acts of Congress in which the same provisions regarding toll was expressed, and all of such provisions provided for the free use of such highways for the transportation of property or troops free from all toll or other charge.

Lake Superior etc. R. R. Co. v. United States, 3 Otto. 442, 23 L. ed. 965, 970.

Congress in the early days commenced to construct a highway from Washington, D. C. to the Mississippi River under the provisions of Article 1, Section 8, of the Constitution. This Cumberland Highway had been constructed in Maryland, Pennsylvania, Ohio and in Indiana, and said highway was under the supervision of the Government without "tolls". Afterwards Congress entered into contracts with Maryland, Pennsylvania, Ohio and Indiana; said states by legislative acts took over the respective portions of said highway in said states and did assent that said states would never charge a toll against the United States for the use of their portions of the said Cumberland Highway. The states of Maryland, Pennsylvania and Ohio repudiated such contracts.

In Maryland, Achison defended against an act of the state to impose a toll upon all passengers upon mail coaches, and, if such toll is not paid, a toll of one dollar on each coach was charged whenever such coach passed over the road. The court declared such toll was inconsistent with the compact between Maryland and Congress.

Achison v. Huddleson, 12 How. 294, 13 L. ed. 993.

In Pennsylvania, an action was brought and the Supreme Court interpreted the provisions of the laws of Maryland, Pennsylvania and Ohio, relating to the Cumberland road and the Acts of Congress transferring said road to the respective states. In the opinion of the court delivered by Mr. Chief Justice Taney, it is said:

"Now, as this was well known to the parties, can it be supposed that when Pennsylvania, by her Act of 1831, proposed to take the road, and keep it in repair from the tolls collected upon it, and exempted from the toll carriages laden with the property of the United States, she yet intended to charge it upon the mails? That in return for the large expenditures she required to be made, before she would receive the road, she confined her exemption to matters of no importance, and reserved the right to tax all that was of real value? And when Congress assented to the proposition, and incurred such heavy expenses for repairs, did they mean to leave their mails through Maryland and Pennsylvania still liable to the toll out of which the road was to be kept in repair? Upon this point the Act of Congress of March 3rd, 1835, is entitled to great consideration. For it was under this law that the States finally took possession of the road and proceeded to collect the toll. By so doing they assented to all the provisions contained in this Act of Congress; and one of them is an express condition that the United States should not thereafter be subject to any expense in relation to the road. Yet under the argument, the expenses of the road are to be defrayed out of the tolls collected upon it. And if the mails in Pennsylvania and Maryland may be charged, it will be found that instead of the entire exception, for which the United States so expressly stipulated, and to which Pennsylvania agreed, a very large proportion of the expenses of repair will be annually thrown upon them. We do not think that either party could have intended, when the contract was made, to

burden the United States in this indirect way for the cost of repairs. So far as the general government is concerned, it might as well be paid directly from the treasury. For nobody, we suppose, will doubt that this toll, although in form it is paid by the contractors, is in fact paid by the Post Office Department * * *.

"In either case it is not free from expense in relation to the road, according to the compact upon which it was surrendered to and accepted by the States."

In such case the act of Pennsylvania charging and collecting certain tolls were held void.

Searight v. Stokes et al., 3 How. 151, 168, 11 L. ed. 537, 645.

The State of Ohio endeavored by subsequent legislation to charge tolls on passengers on mail coaches. This court held such law of Ohio was void, being in contravention of the Acts of Congress and the State of Ohio relating to the surrender and acceptance of the Cumberland road.

Neil, Moore & Co. v. Ohio, 3 How. 721, 11 L. ed. 800.

In Oregon the Federal Government has donated thousands of acres of land for the sole purpose of having a post-road from the Pacific Ocean to the Idaho line, with the only restriction, freedom from tolls in connection with mails and the movement of troops; yet after the government had lost its title to its public lands in the state, it found no post roads and no benefits were derived from such land grant.

U. S. v. California & Oregon Land Co., 148 U. S. 31, 37 L. ed. 354;

U. S. v. Dalles Military Road Co., 140 U. S. 599, 35 L. ed. 561.

The Federal Government has enacted many acts dealing with the impositions of tolls on navigable waters, public highways. Act of May 23, 1828, Ch. 75, 4 Stat. L. 290, provided that certain rivers within the State of Alabama,

> "shall be forever free from tolls for all property belonging to the United States, and for all persons in their service, and for all citizens of the United States, except as to such tolls as may be allowed by act of Congress."

Act of June 23, 1836, Ch. 119, 5 Stat. L. 57, provided that the United States assented to Legislature of the State of Alabama imposing a toll on the use of certain portions of the canals which have been or may be constructed at or around Muscle and Colbert's Shoals of the River of Tennessee.

> "Such tolls shall be expended exclusively on the canals, and shall not exceed in amount the sum required to keep them in repair, and to defray the expenses, etc. * * *."
>
> "This section shall not effect the exemption of the property of the United States, and all persons in their service, from any toll whatever. An annual report shall be made to the Secretary of the Treasury of the United States, of the rate and amount of tolls charged or collected on said canal, and their application."

The property of the United States, and all persons in its service should be free of tolls. Act of August 8, 1846, Ch. 103, 93 Stat., L. 73; Act of Jan. 20, 1870, Ch. 7, 16, Stat., L. 61. By such acts it was provided that

> "the Des Moines River shall forever remain free from any toll, or other charge whatever, for any property of

the United States, or persons in their service, passing along the same."

Act of June 23, 1866, Ch. 138, 14 Stat. L. 73; Act of March 2, 1867, Ch. 144., 14 Stat. L. 421. Such Acts declare:

> "The passage of vessels to and from the Harbor of Michigan City, in Indiana, shall be free and not subject to toll or charge."

Act of July 7, 1870, Ch. 210, 16 Stat. L. 190. Such Act provided for tolls and revenue derived from improvements in the Wisconsin River and between such river and Fox River, for the purpose of paying and "current expenses of operating and keeping the same in repair, shall be paid into the treasury"; also as soon as the United States has been reimbursed such tolls shall be reduced to the least sum so as to operate and keep the improvement in repair. Thereafter by the Act of July 5, 1884, Ch. 229, Sec. 4, all tolls were abolished.

In August 1852, Congress enacted an act aiding the construction of a canal and lock in the St. Marie's River (10 Stat. L. 35, Ch. 92). Government granted to the State of Michigan 750,000 acres of land for the purpose of constructing and completing said canal. Sec. 3 provides that such canal should be a public highway for the use of the Government of the United States,

> "free from toll or other charges upon the vessels of said Government engaged in the public service, or upon vessels employed by the said Government in the transportation of any property or troops of the United States."

Section 5 provided that "for the use of said canal only such tolls as shall be sufficient to pay all necessary expenses for the cars, charge and repairs of the same", can be exacted.

The State of Michigan in 1852 enacted a law and adopted all the conditions expressed in said federal act.

The Federal Government took over such canal and demanded an accounting from the state of certain properties, including about sixty-eight thousand dollars which the state had collected as tolls and had on hand. Mr. Justice Peckham, in delivering the opinion of the court, said:

> "Evidently, it was not supposed that the State was to profit from this grant further than such profit as might arise indirectly from the completion and operation of the canal.
>
> Defendant refers to certain grants of land made in Illinois, Indiana, and Ohio, and perhaps to some of the other States, where such grants were made to aid in the construction of canals in those States, and where possible profits from the construction of such canals were within the contemplation of the various grants. But in the Acts referred to there are no restrictions upon the tolls which the State may charge for the use of their respective canals, the only limitation imposed being that the Government should have their free use for the passing of its vessels; while, in this Act, the toll which the State may charge are to be only such after the payment for its construction, etc., as should be sufficient to pay the necessary expenses for the care, charge and the repairs thereto."
>
> * * *
>
> "There was no intention that the State would reap profit out of this grant by the Government, but the State was to profit from the construction of such

internal improvements wholly within the State by the completion and operation of such canal."

U. S. v. Michigan, 190 U. S. 379, 47 L. ed. 1103.

We submit that such term cannot be disregarded "the long established usage of legislative expression", and "without doing violence to language" (*Lake Superior etc. R. R. Co. v. U. S.*, supra).

VIII.

THE SAID PROVISIONS OF SUBDIVISION (c) OF SECTION 77 OF THE "CALIFORNIA VEHICLE ACT" ARE UNCONSTITUTIONAL, BEING CONTRARY TO AND IN VIOLATION OF THE FEDERAL AID LEGISLATION SO ADOPTED BY THE STATE OF CALIFORNIA.

The Supreme Court of Pennsylvania in an early case said:

> "The legal meaning of the word 'toll' is, and always has been well defined. It is a tribute or custom paid for passage; not for carriage—always something taken for a liberty or privilege, not for a service; and such is the common understanding of the word. Nobody supposes that tolls taken by a turnpike or canal company includes charges for transportation, or that they are anything more than an excise tax demanded and paid for the privilege of using the way. * * *
>
> Before 1833 transportation had been generally over common roads, turnpikes and canals. *The common and legislative minds were then familiar with what was called tolls. They understood by them, sums paid for the privilege of passage without more, and this whether due to a turnpike, a canal or a bridge company."* (Italics ours.)

Boyle v. P. & R. R. Co., 54 Pa. St. 310, 314.

In 1916 Congress was "familiar with what was called tolls" (see the arguments and citations in paragraphs II, III, IV, V and VI in the brief in the *Carley & Hamilton* case, and also in paragraph VII of this brief). Further Congress also had before it the following decisions:

Mr. Justice Bradley, in delivering the opinion, said:

> "This unlimited right of the State to charge or to authorize others to charge toll, freight or fare for transportation on its roads, canals and railroads, arises from the simple fact that they are its own works, or constructed under its authority, it gives them being, it has a right to exact compensation for their use. It has a discretion as to the amount of that compensation. That discretion is a legislative—sovereign discretion, and in its very nature is unrestricted and uncontrolled. The security of the public against any abuse of this discretion resides in the responsibility to the public of those who, for the time being, are officially invested in it. In this respect it is like all other legislative power when not controlled by specific constitutional provisions, and the court cannot presume that it will be exercised detrimentally." * * *
>
> *"Of course the question will be asked, and pertinently asked: Has the public no remedy against exorbitant fares freights exacted by state lines of transportation?"* * * *
>
> *"Whether in addition to this, Congress, under the power to establish post-roads,* * * * and thus to *counteract the apprehended impediments refererd to, is a question which has exercised the profoundest minds of the country. This power was formerly exercised in the construction of the Cumberland Road and other similar works."* (Italics ours.)

B. & O. R. R. Co. v. Maryland, 21 Wall. 456, 22 L. Ed. 678.

Again: Mr Justice Bradley delivering the opinion, said:

> "If the State laws furnish no remedy (in other words, if the charges are sanctioned by them), then as before stated, it is for Congress and not the United States Courts, to regulate the matter, and provide a proper remedy."

This was a charge against unreasonable wharfage by the city.

Ouachita, etc. Packet Co. v. Aiken, 221 U. S. 444, 30 L. ed. 976.

In delivering the opinion Mr. Chief Justice Taney said:

> "Such an unlimited power to levy contributions on the public, and one so inconsistent with the ordinary course of legislation upon that subject, and, we may add, so unjust and injurious to the public, ought not to be sustained in a court of justice, unless it is conferred in plain and express words. It should not be inferred where the slightest doubt could arise, and the words are capable of any other construction; and still less can it be inferred in a charter like this, where the toll granted upon goods and property of every kind is so carefully specified and fixed in the law, and the charter altogether silent in relation to passengers. The contrary inference would seem to be irresistible." * * *
>
> "It is very possible, indeed, if the improvement in steam navigation could have been foreseen, and the great increase in travel and intercourse it would produce, that the Legislatures of the States might in some form or other have allowed a toll with reference to passengers, as a compensation for the facilities afforded by the canal. But it is not the province of this Court to enlarge the powers of a corporation beyond the limitations of the charter, because circumstances have changed. Our province is to expound

the law as it stands, not to determine whether larger powers would not have been given if the Legislature had anticipated events which have since happened."

* * *

"The questions before us are of high importance to the community, and are emphatically questions between the rights of the public and the powers of the corporation. The privilege of making this canal, and of receiving tolls upon it, was granted by the States without any compensation to the public but the convenience it was expected to afford. The States, as well as the United States, have contributed to the expense of its construction. And the court is called upon to decide whether the States who chartered this company have authorized it to enact any amount of toll it may think proper from their own citizens, as well as others, for the privilege of passing over it; or may, if such be its interest or policy, refuse altogether the permission to pass."

Perrine v. Chesapeake & Del. Canal Co., 9 How. 172, 13 L. Ed. 92.

So Congress enacted on July 11th, 1916, an Act entitled:

"An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes."

Chap. 241, 39 Stat. at L. 355 (R. 9, 10).

By such Act, Congress was willing to aid a State if it pass a law assenting to and agreeing to abide with all the restrictions contained in the Federal Act. The said Act prevented any money to be expended on any street in any city having more than 2500 inhabitants (Congress knew that all streets in cities are improved, constructed, maintained and repaired by city taxes and assessments, and

also by license fees. (See brief of Carley & Hamilton, as well as our brief).) Again the following prohibition is found:

> "Provided that all roads constructed under the provisions of this Act shall be free from tolls of all kinds."

Congress has had a liberal education. Many millions of dollars had been spent on such education. Congress decided that the public, including these appellants and all others operating on the Federal Aided Highways, are to be protected and the States are no longer to reap a profit from the Federal aid money, which money was collected from said public.

As said by Justice Bradley in the opinion in *Ouachita* case, supra,

> "If the State laws furnish no remedy * * * it is for Congress and not the United States Courts, to regulate the matter and provide a proper remedy."

Congress did provide a proper remedy by enacting said prohibition.

The term "free from tolls of all kinds" protects every user on Federal Aided Highways in any State against tolls of any nature, or the term is meaningless.

As Mr. Justice Sutherland in delivering the opinion of this court, said:

> "The rule is one well established and frequently invoked, but it is, after all, a rule of construction, to be resorted to only as an aid to the ascertainment of the meaning of doubtful words and phrases, and not to control or limit their meaning contrary to the true

intent. It cannot be employed to render general words meaningless, since that would be to disregard the primary rules that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning."

Mason v. U. S., 260 U. S. 545, 67 L. Ed. 396.

Any attempt to destroy or make meaningless any word contained in the term "free from tolls of all kinds" would do violence to the language employed therein and be in defiance of the settled line of judicial decisions and the Acts of Congress in which the said term had been interpreted, and upon which Congress inserted such term in said Federal aid legislation.

The State of California, with a full knowledge of this prohibition against "tolls of all kinds", did in 1917 enact a law assenting to and agreeing to abide by all of the provisions of the Rural Post Road Act, including the prohibition against tolls of all kinds, to-wit:

"An Act expressing assent of the State of California to the provisions of the Act of Congress approved July 11, 1916, entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes'."

Chap. 29, Laws of 1917 (R. 10).

Congress enacted July 2nd, 1918, an act, to-wit:

"An Act making appropriations for the service of the Post Office Department for the fiscal year ending June Thirtieth, Nineteen Hundred and Nineteen, and for other purposes."

Sec. 7 of said Act provides that the Postmaster General shall "conduct experiments in the operation of motor vehicle truck routes in the vicinities of said cities of the United States as he may select", so as to promote the "conservation of food products and to facilitate the collection and delivery thereof from the producer to consumer, and the delivery of articles necessary in the production of such food products to the producers in the production of such food products to the producer". Congress appropriated $300,000 for such purpose.

Congress no doubt had before it the report of the Postmaster General and it enacted the "Federal Highway Act", to-wit:

> "An Act to amend the Act entitled 'An Act to provide that the United States shall and the States in the construction of rural post roads and for other purposes", approved July 11, 1916, as amended and supplemented, and for other purposes."
>
> Chap. 119, 42 Stat. at L. 212 (R. 10).

This "Federal Highway Act" broadened the scope of the Rural Post Road Act and made a comprehensive Act. In Section II the following terms are defined:

> "The term 'highway' includes rights of way, bridges, drainage structures, signs, guard rails, and protective structures in connection with highways, but shall not include any highway or street in a municipality having a population of two thousand five hundred or more as shown by the last available census, except that portion of any such highway or street along which within a distance of one mile the houses average more than two hundred feet apart."
>
> "The term 'construction' means the supervising, inspecting, actual building, and all expenses incidental

to the construction of a highway except locating, surveying, mapping, and costs of rights of way."

"The term 'reconstruction' means a widening or rebuilding of the highway or any portion thereof to make it a continuous road, and of sufficient width and strength to care adequately for traffic needs."

Sec. 6. "Highways which may receive Federal aid shall be divided into two classes, one of which shall be known as primary or interstate highways, and shall not exceed three-sevenths of the total mileage which may receive Federal aid, and the other which shall connect or correlate therewith and be known as secondary or intercounty highways, and shall consist of the remainder of the mileage which may receive Federal aid."

Sec. 9. "That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds."

Sec. 12. "That the construction and reconstruction of the highways or parts of highways under the provisions of this Act, * * *."

The Federal aid is not to be used in certain cities; every highway constructed or reconstructed, or any portion of same, is covered by the Act; the prohibition against tolls of any kind is broadened, as any Federal aided highway, or any portion thereof, is protected.

The State of California enacted the "California Vehicle Act", being Chap. 226, Stats. of 1923, and was amended by Chap. 844, Stats. of 1927. Section (c) of said Act, as amended, compels the appellants and said others to pay a "toll", not only for their operation on the Federal Aided Highways, but also on city streets.

It is admitted that the Federal Government has since the year 1917 paid over to said State many millions of

dollars under said Federal Acts for the construction or reconstruction of highways, both primary or interstate highways, and secondary or intercounty highways, and the Government will pay many millions of dollars more; said Federal aid has been and will be expended on all highways, including county highways; all state highways and all county roads or highways are rural post roads and also come within the provisions of said Federal Acts; all moneys collected from said subdivision (c) is used exclusively in the construction and maintenance of the State highways or county highways, and no portion is used for the construction, reconstruction, maintenance and repair of any streets in any cities as said streets are constructed, reconstructed, maintained and repaired by taxation, assessments, or license fees (R. 10); the appellants and all said others must pay in advance said exactions under the said subdivision (c) and said charges are flat no matter what percentage of the use of their motor vehicles is over the streets or the highways outside of cities, and it is admitted that 75% of their operation is on the streets of the cities (R. 7).

Mr. Justice Sutherland in delivering the opinion said:

> "If the act interferes with the exercise by the state of its full powers of taxation or has the effect of removing property from its reach which otherwise would be within it, that is a contingency which affords no ground for judicial relief. The act is a law of the United States made in pursuance of the Constitution and, therefore, the supreme law of the land, the constitution or laws of the states to the contrary notwithstanding. Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield."

Florida v. Mellon, 273 U. S. 12, 71 L. ed. 325.

The Federal Aid Legislation is an act of Congress and the State cannot offend the prohibition directly or indirectly or make any profit by the Federal money in the construction or reconstruction of the highways of the State.

The appellants and said others have paid the $3.00 on every motor vehicle, trailer and semi-trailer, and the amount of money collected under said subdivision (a) of said Section 77 will be more than $5,200,000 and the cost of the regulation is less than $2,000,000. The appellants and said others are not attacking the said subdivision (a), but do attack subdivision (c), under which about 150,000 motor vehicles, trailers, and semi-trailers have paid over $3,000,000 during the six months from December 31st, 1928. If the said provisions of said subdivision (c) is not a toll of any kind, then the State can raise the charges in subdivision (c) to any amount. On December 1st, 1928, the charges under subdivisions (c) were raised 250%, and the State can double said charges at the next session of the Legislature in 1931. Congress did not intend to permit the States to exact such charges for the use of motor vehicles on the Federal Aided Highways.

The said aided highways are internal improvements and the State cannot profit from the construction. The Cumberland Highway was constructed by the Government and the public did not pay any toll, even if the vehicles operated wholly within a State. Now the Federal government is aiding the States in the construction or reconstruction of all highways. We cannot see any

difference whether the Government owned the highways without toll or the highways are constructed or reconstructed by Federal aid as long as the State has assented to the prohibition regarding tolls of all kinds.

It is admitted by the motion to dismiss that every highway in the State, outside of the limits of cities, is protected under the Federal Aid Legislation.

The appellees will try to argue that there are some highways not covered by the Federal Aid Legislation, although they have admitted the allegations in the Bill of Complaint. It is not necessary to have an entire highway to be protected, but only a part of the same.

The exactions under subdivision (c) are not divided and the appellants and said others pay in advance and they are not able to find out what percentage of use.

The Supreme Court has had before it a case in point.

New Mexico enacted a law requiring a license fee of $50.00 a year, payable in advance charging the distributors of motor fuel for each and every distributing station in the State. This court held that such license fee was void and unconstitutional, being contrary to and in violation of the Commerce clause, as such license fee payable in advance could not be divided into interstate or intrastate business.

Askren v. Continental Oil Co., 252 U. S. 444, 64 L. Ed. 654;

Bowman v. Continental Oil Co., 256 U. S. 642, 65 L. Ed. 1139.

See also:

Barrett v. New York, 232 U. S. 30, 58 L. Ed. 483;
Leloupe v. Mobile, 127 U. S. 640, 32 L. Ed. 311;
Crutcher v. Kentucky, 141 U. S. 47, 35 L. Ed. 649;
Post Teleg.-Cable Co. v. Richmond, 249 U. S. 252, 63 L. Ed. 590.

The appellees argued that the small amount of the Federal Aid money was not sufficient to construct or reconstruct the highways, and therefore the provisions prohibiting tolls of all kinds could not apply as these exactions are not tolls.

This question has been decided by this court in the case of a land granted railway.

In delivering the opinion Mr. Justice Brandeis said:

"The obligation of a land aid railway to carry the mail at a price fixed by Congress is a charge upon the property. The public lands were granted to Michigan to aid the construction of certain railways upon certain conditions. The Legislature of Michigan could not dispose of the lands except in accordance with the terms of the grant. By the act of February 14, 1857, it accepted the grant and enacted legislation to give legal effect to the conditions of it. Section 4 of the Act is as follows:

'Said railroads shall be and forever remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States; and the United States mail shall be transported over said railroads, under the direction of the Post Office Department; at such price as Congress may by law direct, * * *'.

> The order of the Board of Control of May 1, 1873, directing the transfer of the land to the Port Huron and Lake Michigan Company, and the patent issued by the Governor, were founded upon the authority of Section 11 of this Act; and under date of May 30, 1873, the company accepted the lands with the burden they imposed. The railroad, whose owners and constructors accepted aid derived from these lands, became charged by operation of law with the burden of transporting the mails. The question whether that company would have accepted the land with its burden if it had foreseen the validity of the title of the western lands is wholly immaterial. The burden attached upon the acceptance of any aid whatsoever, no matter how disproportionate to the cost of constructing the portion so aided."
>
> *Grand Trunk Western Railway Co. v. United States,* 252 U. S. 112, 64 L. Ed. 484.

We submit that this court takes judicial notice of the fact that the States are assessing exorbitant charges for the use of such Federal Aided Highways, and in many of the States such return exceeds the return from taxation on the taxable property of the State. There seems to be no desire to reduce such fees, but the States are now increasing the gas taxes and the registration fees. We may see the same situation as was developed in the early history of this country, and highways abandoned after being constructed. Congress never intended to receive back one dollar from the millions and millions of dollars which have been and are now being appropriated for the benefit of the public. The Acts of Congress have shown, as set out in this brief, that it has been and is now its desire to do away with and abolish "tolls of all kinds" for the use of internal improvements. The States are acting in

the construction of such Federal Aided Highways as trustees for the public, and of the Federal Government, and the public are entitled to receive the benefits of the use of such Federal Aided Highways without paying to the States any charges for such use.

It is preposterous to claim that the State can reimburse themselves for their share in the construction of said Federal Aided Highways, and in such manner recover back not only their share, but also in the future to receive a profit on such construction. The Federal Government has already paid over to the State many millions of dollars which money has been used on Federal aided highways, and the Federal Government will never receive back one dollar from such expenditure, while the State is enjoying millions of dollars for the construction, maintenance and repair of said highways, all out of such exactions from the public. The State is receiving the benefits of such money out of the expenditures of such Federal Aid. Congress never intended that the State should make profit out of the moneys paid under such Federal Aid Legislation.

Said subdivision (c), as aforesaid, is unconstitutional, being contrary to and in violation of the said Federal Aid Legislation, so adopted by the State of California.

IX.

THE SAID ACTS AND THREATENED ACTS OF SAID APPELLEE SNOOK, IN ENFORCING SUBDIVISION (c), ARE ILLEGAL AND VOID, AS SAID SUBDIVISION IS UNCONSTITUTIONAL.

Said appellee Snook threatens to and will enforce the provisions of subdivision (c) by fines or imprisonment, or

both, as well as seizing and selling the motor vehicles of the appellants and others at any time said appellants and said others desire to put in operation additional vehicles. The appellants and said others have been and still are suffering daily irreparable loss and damage.

We refer to above paragraphs of our brief, in which the facts, arguments and citations are set out therein, showing our position.

X.

THE ACTS AND THREATENED ACTS OF APPELLEE RILEY, UNDER COLOR OF HIS OFFICE, IN DISTRIBUTING THE MONEYS COLLECTED UNDER SAID SUBDIVISION (c) ARE ILLEGAL AND VOID, AS SAID SUBDIVISION IS UNCONSTITUTIONAL.

The appellee Riley has the exclusive power to draw money from the "Motor Vehicle Fund", and said Riley had, at the commencement of this action all of the moneys collected under said subdivision (c) in said "Motor Vehicle Fund". The said subdivision (c) is unconstitutional and said appellee Riley must respond.

We refer to the above paragraphs of our brief, in which the facts, arguments and citations are set out therein, showing our position.

XI.

THE ACTS AND THREATENED ACTS OF SAID APPELLEES IN ENFORCING SAID UNCONSTITUTIONAL AND VOID SUBDIVISION (c) ARE ILLEGAL BEING CONTRARY TO AND IN VIOLATION TO THE CONSTITUTION OF THE UNITED STATES, ESPECIALLY THE FOURTEENTH AMENDMENT THEREOF, AND ALSO THE CONSTITUTION OF CALIFORNIA.

We refer to the paragraphs of our brief in which the facts, arguments and citations are set out therein showing our position.

XII.

THE APPELLANTS AND ALL OTHERS SIMILARLY INTERESTED OR SITUATED ARE ENTITTLED TO A PERMANENT INJUNCTION AGAINST THE ENFORCEMENT OF THE PROVISIONS OF SUBDIVISION (c) AND FOR PROPER RELIEF IN THE PREMISES.

We refer to the paragraphs of our brief in which the facts, arguments and citations are set out therein showing our position.

We submit that the appellants and all others similarly interested or situated are entitled to all the relief prayed for in the bill of complaint.

W. R. Crawford,
J. F. Vizzard,
Henry G. Hotchkiss,
Solicitors for Appellants.

SUPREME COURT OF THE UNITED STATES.

Nos. 86, 267—October Term, 1929.

Carley & Hamilton, Inc.; Edward Malde, doing business as A. B. C. Transfer & Storage Company; S. Brizzolara, etc., et al., Appellants,
86 *vs.*
Frank G. Snook, as Chief of the Division of Motor Vehicles, State of California.

Geo. T. Cottingham and William C. Meginnes, doing business as City Transfer Company, et al., Appellants,
267 *vs.*
Frank G. Snook, as Chief of Division of Motor Vehicles of the State of California and Ray L. Riley, as State Controller of California.

Appeals from the District Court of the United States for the Northern District of California.

[February 24, 1930.]

Mr. Justice Stone delivered the opinion of the Court.

These are appeals under § 266 of the Judicial Code, from final decrees of District Courts of three judges for the Northern District of California. Each, on motion to dismiss the complaint, dissolved a temporary injunction, dismissed the complaint and upheld the constitutionality of § 77 (b) and (c) of the Motor Vehicle Act of California, 1923 California Statutes, c. 266, as amended, 1927 California Statutes, c. 844. Section 36 (a) requires every motor vehicle operated upon the public highways of the state to be registered. Under § 77 (a) an annual fee of $3.00 is exacted for the

[1]Sec. 77. Registration fees. (a) A registration fee of three dollars shall be paid to the division for the registration of every motor vehicle, trailer or

registration of all motor vehicles. By subsections (b) and (c), printed in the margin so far as relevant,[1] a graduated license or registration fee, payable in advance, is exacted for registration of motor vehicles used for transportation "of passengers for hire or for transportation of property". The duty of enforcing the Act

semitrailer, except for those which are exempted in this act, and such fee shall be paid at the time application is made for registration.

(b) In addition to the registration fee specified in subdivision (a) of this section, there shall be paid for the registration of every electric passenger motor vehicle a registration fee of ten dollars, and for the registration of every electric motor vehicle designed, used or maintained primarily for the transportation of passengers for hire, or for the transportation of property, there shall be paid fees according to the following schedule:

For each such vehicle weighing, when unladen, less than six thousand pounds $50.00

For each such vehicle weighing, when unladen, six thousand pounds or more, but less than ten thousand pounds..... 70.00

For each such vehicle weighing, when unladen, ten thousand pounds or more 90.00

(c) The following registration fees in addition to the registration fee specified in subdivision (a) of this section, shall be paid for the registration of vehicles, including trailers and semitrailers, designed, used or maintained primarily for the transportation of passengers for hire or for the transportation of property, according to the following table, except that the fees specified in this subsection need not be paid for electric vehicles.

When such vehicles are equipped wholly with pneumatic tires:

For each such vehicle weighing, when unladen, three thousand pounds or more, but less than six thousand pounds..... $15.00

For each such vehicle weighing, when unladen, six thousand pounds or more, but less than ten thousand pounds and limited under the provisions of this act to a total weight, including vehicle and load, not exceeding twenty-two thousand pounds..... 40.00

For each such vehicle weighing, when unladen, ten thousand pounds or more and limited under the provisions of this act to a total weight, including vehicle and load, not exceeding twenty-two thousand pounds 50.00

For each such vehicle weighing, when unladen, six thousand pounds or more and entitled under the provisions of this act to a total weight, including vehicle and load, in excess of twenty-two thousand pounds 70.00

When such vehicles are not equipped wholly with pneumatic tires there shall be paid in addition to the fees specified in subdivision (a) of this section fees according to the weight thereof unladen amounting to twice the fees set forth in the foregoing table.

is committed to the respondent, the Chief of the Division of Motor Vehicles, who is required to deposit the fees collected in the state treasury to the credit of the "motor vehicle fund." After deductions for the support of the Division of Motor Vehicles, the fund is required to be expended, one-half by paying it over to the counties, to be used by them in the construction and maintenance of public roads, the other half for the maintenance of state roads.

Under §§ 51, 153 (c), operation of a motor vehicle for which the registration fees have not been paid is a misdemeanor, punishable by fine of not more than $500, or imprisonment for not more than six months, or both. By § 81, fees not paid for thirty days after they become due are doubled. Their payment is secured by a lien upon the vehicles required to be registered, enforcible by seizure and sale.

Incorporated cities in California may enact ordinances requiring license fees for the operation of motor vehicles used in transporting passengers for hire, and property, within city limits. Constitution of California, Art. XI, §§ 11, 12; § 145 Motor Vehicle Act. It is conceded that all California cities have passed ordinances imposing such registration fees, varying from $5 to $42 per motor vehicle, in addition to those scheduled in § 77, and that 75% of the fees collected under these ordinances are applied to the maintenance of streets in cities.

The petitioners in both suits are owners of motor vehicles of various types, described in § 77 (b) or (c), which petitioners in No. 86 operate exclusively over highways within the limits of incorporated cities, and which petitioners in No. 267 operate over highways principally within but partly without city limits. Both complaints assail the validity of the Act under the Constitution of California and the Fourteenth Amendment of the Federal Constitution. The bill in No. 86 was filed December 29, 1928. Its allegations, admitted by the motion to dismiss, are that the petitioners will be required to pay license fees for the ensuing year on or before January 31st, 1929, in order to use their motor vehicles upon streets of incorporated cities, and to avoid the destruction of their business and irreparable loss by the seizure and sale of their motor vehicles and the imposition of the penalties of the Act, which respondent threatens to enforce. See *Packard* v. *Banton*, 264 U. S. 140.

Petitioners insist that the registration fees imposed by § 77 (b) and (c) are in effect tolls for the use of the highways maintained by the state, see *Matter of Application of Schuler,* 167 Calif. 282, 290; *Bacon Service Corp.* v. *Huss,* 199 Calif. 21, 29, and as they pay the license tax imposed by the cities for the use of city streets, the exaction of the additional "tolls" with respect to highways outside of cities, which petitioners in No. 86 do not use and which the petitioners in No. 267 use less than the city streets, is a violation of the Fourteenth Amendment.

This argument is based upon cases in this Court arising, not under the Fourteenth Amendment, but the commerce clause of the Constitution, where the tax assailed was levied by a state on interstate carriers and purported to be exacted for their use of the state highways. In such cases this Court must ascertain whether a forbidden burden is imposed on interstate commerce. For that purpose it may inquire whether the tax bears some reasonable relation to the use of the state facilities by the carrier. *Sprout* v. *South Bend,* 277 U. S. 163; *Interstate Busses Corporation* v. *Blodgett,* 276 U. S. 245, 246; *Hendrick* v. *Maryland,* 235 U. S. 619; *Kane* v. *State of New Jersey,* 242 U. S. 160; *Clark* v. *Poor,* 274 U. S. 554.

But we are now concerned only with the use of motor cars in intrastate commerce, and in any case, not the precise name which may be given to the money payment demanded, but its effect upon the persons paying it, is of importance in determining whether the Constitution is infringed. Whatever other descriptive term may be applied to the present registration fees, they are exactions, made in the exercise of the state taxing power, for the privilege of operating specified classes of motor vehicles over public highways, and expended for state purposes. Such fees, if covered into the state treasury and used for public purposes, as are general taxes, obviously would not offend against the due process clause. Nor can we see that they do so the more because the state has designated the particular public purposes for which they may be used. There is nothing in the Federal Constitution which requires a state to apply such fees for the benefit of those who pay them. See *Thomas* v. *Gay,* 169 U. S. 264, 280.

A corollary of this contention is that although the fees are not *per se* disproportionate to the privilege of operating over all the highways of the state, petitioners are nevertheless entitled to receive licenses limiting the operation of their motor cars to the few

highways which they wish to use, upon payment of correspondingly reduced fees. But no constitutional principle is suggested, and we know of none, which would enable a licensee thus to regulate the extent of the privilege granted or to assail an otherwise valid tax upon it merely because a reduction of the privilege and the tax would better suit his convenience or his pocketbook.

The objection that the petitioners should not be required to pay the challenged fees because they are already paying the city license tax is but the familiar one, often rejected, that a state may not, by different statutes, impose two taxes upon the same subject matter, although, concededly, the total tax, if imposed by a single taxing statute, would not transgress the due process clause. See *Swiss Corporation* v. *Shanks*, 273 U. S. 407, 413; *St. Louis, Southwestern Ry.* v. *Arkansas*, 235 U. S. 350, 367, 368; *Shaffer* v. *Carter*, 252 U. S. 37, 58; *Forth Smith Lumber Co.* v. *Arkansas*, 251 U. S. 532, 533.

Only a word need be said of petitioner's contention that the exemption of all vehicles weighing less than 3,000 pounds, although their loaded weight may be much more than vehicles not exempt, infringes the equal protection clause of the Fourteenth Amendment and the similar § 21 of Art. I of the State Constitution[2]. That the legislature may graduate the fees according to the propensities of the vehicles to injure or to destroy the public highways, and may exempt those with respect to which this tendency is slight or non-existent, cannot be doubted. We may not assume that vehicles weighing less than 3,000 pounds, with loads which they usually carry, are not of this class, or that vehicles weighing more than 3,000 pounds with their accustomed burden added do not have this tendency. It is for the legislature to draw the line between the two classes. *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, 300, 301; *Clark* v. *Titusville*, 184 U. S. 329, 331; *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62; *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322; *Watson* v. *State Comptroller*, 254 U. S. 122, 125; *Franchise Motor Freight Assn.* v. *Seavey*, 196 Calif. 77, 81; *In re Schmolke*, 199 Calif. 42, 48; Cf. *Fifth Avenue Coach Co.* v. *New York*, 221 U. S. 467, 484; *Packard* v. *Banton, supra; Silver* v. *Silver*, 280 U. S. 117, 123.

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[2] " . . . Nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

These conclusions are decisive of the like questions raised in No. 267. An additional objection raised in that suit is that the registration fees under § 77 are "tolls" prohibited by the Federal Highway Act, 42 Stat. 212, under which the state has received grants of federal aid for the construction and reconstruction of highways. Section 9 of the Federal Highway Act provides "that all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds".

The present registration fees cannot be said to be tolls in the commonly accepted sense of a proprietor's charge for the passage over a highway or bridge, exacted when and as the privilege of passage is exercised. See *Huse* v. *Glover,* 119 U. S. 543, 548; *Sands* v. *Manistee River Imp. Co.,* 123 U. S. 288, 293; *St. Louis* v. *Western Union Telegraph Co.,* 148 U. S. 92, 97. The fact that registration fees are imposed generally upon all residents who use motor vehicles within the state, without reference to any particular highways or to the extent or frequency of the use, and that, as in California, they are not exacted of non-resident automobilists passing through the state [1923 California Statutes, c. 266, § 47], marks them as demands of sovereignty, not of proprietorship, and likens them to taxes rather than tolls. The fact that they may have been held justified, in other connections, because of their similarity to "tolls for the use of highways" affords no basis for saying that the present fees are prohibited tolls within the meaning of the Federal Highway Act.

Such fees were a common form of state license tax before the Federal Highway Act was adopted in 1921. That act contemplated the continued maintenance by the States of state highways, constructed with federal aid, the expense of which must necessarily be defrayed from revenues derived from state taxation. It cannot be supposed that Congress intended to procure the abandonment by the states of this well recognized type of taxation without more explicit language than that prohibiting tolls found in § 9. Judgments in both cases

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.